Appendix A

STATE v. MARION FRANK CRAWFORD.

(Filed 27 November 1963.)

1. Criminal Law § 71—

Only a voluntary confession is competent in evidence, and a confession is voluntary when, and only when, it is in fact voluntarily made.

2. Same—

A confession otherwise voluntary is not rendered involuntary and therefore incompetent by the mere fact that the accused at the time of making the confession was under arrest or in jail or in the presence of armed officers.

3. Same—

Evidence upon the preliminary inquiry that defendant was advised of his rights and that defendant then, without being threatened or coerced, made the incriminating statements offered in evidence, and that defendant's counsel was given opportunity to cross-examine the witness in regard to the voluntariness of the confession made by defendant to the witness, *is held* to support the court's finding that the confession was in fact voluntary, and the admission of the confession in evidence will not be disturbed.

4. Rape § 1—

Rape is the carnal knowledge of a female, forcibly and against her will.

5. Rape § 8—

Carnal knowledge of any female child under the age of twelve years, regardless of consent, is rape. G.S. 14-21.

6. Homicide § 4—

A homicide committed in the prepetration of the capital offense of rape is murder in the first degree, irrespective of premeditation and deliberation. G.S. 14-17.

7. Homicide § 11—

An indictment for homicide in the language of the statute is sufficient, and proof that the murder was committed in the prepetration of a felony constitutes no variance. G.S. 52-144.

8. Criminal Law § 101—

An extrajudicial confession of a defendant is alone insufficient to sustain a conviction, but if the confession is corroborated by other evidence in regard to all of the elements of the crime, the evidence is sufficient to be submitted to the jury on the question of guilt.

9. Homicide § 20— Evidence of defendant's guilt of murder in the first degree held sufficient to sustain conviction.

The confession of defendant that while he was having sexual intercourse with an eight-year old child she started to scream and that he put his hand over her mouth, that when he took his hand off her mouth she spoke once, and said nothing more, that he believed her to be dead and carried away and hid her body, with corroborating evidence that deceased was last seen with defendant and that her body was found at the place where defendant said he placed it, with expert medical testimony of the use of force and violence in the penetration of deceased's vagina and that death resulted from suffocation from the bursting of air sacs in deceased's lungs, *is held* sufficient to be submitted to the jury and sustain a conviction of murder in the first degree.

10. Homicide § 29; Criminal Law § 114— Charge on right of jury to recommend life imprisonment held without error.

Where, in the preliminary portion of the charge, the court instructs the jury that it is the sole province of the jury to find the facts and return its verdict, and to exercise a discretion in regard to the punishment as the court would thereafter instruct the jury, and that the jury should arrive at the facts without sympathy or prejudice toward any person, and the court thereafter, in instructing the jury as to the possible verdicts, fully charges the jury that in the event the jury found defendant guilty of murder in the first degree the jury had the unbridled discretion to recommend that the punishment should be life imprisonment, the charge is without error, since, construed contextually, the cautionary instruction that the jury should arrive at their verdict without sympathy or prejudice toward any person could not have been misunderstood by the jury as affecting its unbridled discretion to recommend life imprisonment.

11. Homicide § 28—

When all of the evidence tends to show that defendant killed deceased in the prepetration of rape, without evidence of guilt of a less degree of the crime, the court correctly refrains from submitting the question of defendant's guilt of murder in the second degree.

APPEAL by defendant from *Johnston, J.*, 4 February 1963 Session of FORSYTH.

Criminal prosecution on indictment charging the defendant with murder in the first degree.

Plea: Not guilty. Verdict: Guilty of murder in the first degree as charged in the bill of indictment.

From a judgment of death by asphyxiation, defendant appeals.

Attorney General T. W. Bruton and Assistant Attorney General James F. Bullock for the State.

Hosea V. Price for defendant appellant.

PARKER, J. The record discloses that the State introduced evidence as follows: On Sunday, 18 November 1962 Sandra Denise Marshall, a Negro girl born 14 August 1954, was living with her mother Vera Sanders in a house at 1203 Free Street in the Happy Hill Garden section of the city of Winston-Salem. Defendant Marion Frank Crawford, a Negro man born on 10 June 1936, lived in a house on Willow Street, which is back of the house where Vera Sanders and her daughter lived. Vera Sanders knew the defendant by the name of Willie. Sandra and other children in the neighborhood called him Uncle Willie.

About 4:00 p.m. on Sunday, 18 November 1962 the defendant came to Vera Sanders' home. He stayed about 15 minutes, and then he and Sandra went out the house about the same time. That was the last time Vera saw Sandra alive.

Eloise Finney lives at 1207 Free Street. About 4:00 or 4:15 p.m. on 18 November 1962 defendant came to her house with Sandra Denise Marshall. Eloise said to him: "Now that your wife has gone home already, you're just like a little chicken on a wire." "I says, you're just running around everywhere." He said: "Yes, that when his wife was there he gave her all the loving and affection she needed, but when she was away he did what he wanted to." Sandra did not say anything, "She just looked up like she was hypnotized." They stayed three or four minutes. Then, as Eloise testified, "he just took her by the hand, and they both went out my back door."

When Sandra did not return home, her mother went out looking for her. Periodically she returned to see if Sandra had come back. About 11:00 p.m. that night Eloise Finney came to her house to use a buffer. She and Eloise went to where the defendant was living, arriving there about 11:15 p.m. The defendant came to the door. Vera asked him about Sandra. He replied, "he left all the children out on the street playing." Vera then went to Elizabeth Griffin's house, and called her mother's home. She then went back to where the defendant lived. Then she and the defendant went to a number of places, and finally to the police station to report that Sandra was missing.

About 10:30 a.m. on 26 November 1962 Sergeant G. C. Wilson of the Winston-Salem Police Department and four policemen and the Rescue Squad went to a graveyard in the Happy Hill Garden section. This cemetery is not kept up. It is grown over with briers, honeysuckle vines, weeds, and trees, and in some places it is impossible to get through. They searched this graveyard for about three hours looking for Sandra, but without success. They left and went to other places looking for her, and again without success. Then they returned to the cemetery in the Happy Hill Garden section, and that afternoon found Sandra's dead body in a hole under a tree that had blown over and pulled up some dirt as it was blown over. The dead body and the hole were covered with leaves and honeysuckle vines and a small toy wagon. When Sergeant Wilson raised the little toy wagon and saw the child's coat, he placed the wagon back and called the county coroner Dr. W. D. Vreeland. He did not move or touch the body.

Dr. Vreeland is a graduate of an accredited medical school and is licensed to practice medicine in North Carolina. The court found he is an expert physician and surgeon. When he arrived at the scene and was standing within two feet of the body, he could not see it, because it was covered with vines and leaves. Sergeant Wilson pointed the place out to him. He cleared away the vines and leaves and the little toy wagon that was on the top of the body. When he first saw the body, it was lying on its left side with the head sharply doubled down, up under the left shoulder, the arms were wrapped around the head, and the legs were pulled up sharply against the chest. Her dead body was fully clothed except for her panties, which were under the body. Dr. Vreeland used gloves in a superficial examination of the body there, because she appeared to have been dead some time. The body was carried to the Kate Bitting Hospital morgue, where Dr. Vreeland examined the body in more detail. In the hospital he found her vagina gaping open widely, and it definitely appeared to be injured. Dr. Vreeland's opinion was that Sandra died from suffocation and shock due to trauma. Being of opinion that it would be preferable to have Sandra's body examined by a pathologist, Dr. Vreeland sent her body to Dr. Geoffrey Mann of Richmond, Virginia, for an autopsy.

At 8:20 p.m. on 26 November 1962, Sergeant C. E. Cherry of the Winston-Salem Police Department picked up the dead body of Sandra Denise Marshall at the Kate Bitting Hospital morgue and delivered it to the morgue of the University of Virginia, Medical Center, Richmond, Virginia, at 2:20 a.m. on 27 November 1962. About 9:00 a.m. on 27 November 1962, Dr. Geoffrey Mann started an autopsy on

Sandra's dead body. Sergeant Cherry was present during most of Dr. Mann's autopsy on Sandra's dead body.

Dr. Geoffrey Mann is a graduate of an accredited medical school, the University of Manitoba, Manitoba, Canada. He holds the following degrees: AA, BS, LLB and MD. He is licensed to practice medicine in Virginia and Mississippi. He is a Fellow of the Royal Society of Tropical Medicine and Hygiene, a Fellow of the American College of Pathologists, a Fellow of the American College of Clinical Pathologists, a Fellow of the American Academy of Forensic Sciences. He is the author of a number of textbooks in the field of forensic pathology and traumatic pathology. He is a contributor to about a hundred papers on the subject. He is Chief Medical Examiner of Virginia; Professor and Chairman of the Department of Legal Medicine of the Medical College of Virginia; and Professor of Forensic Medicine at the University of Virginia. He is senior consultant to the Armed Forces Institute of Pathology, and senior consultant of the Federal Air Aviation Agency. He has been engaged in the practice of forensic pathology and conductor of post-mortem examinations due to traumatic deaths for about twenty years. He has performed ten to fifteen thousand autopsies. The court held that Dr. Mann is an expert as a physician and surgeon, specializing in the field of pathology.

Dr. Mann testified in substance: Beginning at 9:30 a.m. on 27 November 1962 he performed a post-mortem examination on the body of Sandra Denise Marshall, which body was identified to him by Sergeant C. E. Cherry, a police officer who accompanied the body. He examined Sandra's body from head to toe, inside and out. He first made an external examination of the body. The child had a considerable number of abrasions about the face and forehead and over various other portions of the legs and arms, where the skin had rubbed off. She had numerous scratches about the body, many of which he thought were post-mortem; that is, that they occurred after death, and probably caused from dragging the body, or the body being forced against some object, such as the ground or some extraneous, foreign material. His autopsy disclosed that the child's vaginal orifice had been widely dilated. Her hymen had been violently torn and completely ruptured as a result of some entry into her vagina. He could pick up the hymen by using forceps and reconstruct it. There was a tremendous amount of bruising inside her vagina. The membrane separating the private parts of the child from the lower portion of the pelvis was completely suffused with blood, causing it to be markedly swollen and filled with fluid and blood. It takes tremendous injury to produce this type of membrane in this particular region. In his opinion, based on his autopsy,

there had been a forceful entry into the child's vagina by some foreign object, applied with considerable force. His autopsy of Sandra's body showed that many of the little air sacs which make up the lungs had been exploded. This is almost one hundred per cent indicative that severe pressure had been applied to her mouth and nose. He found marks on her neck, which he interpreted as fingernail marks, and a small bit of hemorrhage in a muscle of her neck. In his opinion, Sandra came to her death as a result of suffocation by pressure being applied to the mouth and nose: "that pressure applied to the mouth and nose played the biggest factor in the death of the child." From his examination he thought she had been dead anywhere from three to ten days, with the probability leaning to ten days rather than three.

About 11:30 p.m. on 29 November 1962, three police officers of Winston-Salem arrested the defendant in the town of Jonesville at the home of Tilden Foster. At that time the defendant was known to them as Willie Gilchrist. They carried him to the city hall in Winston-Salem and talked to him 15 or 20 minutes in the office of Detective Captain Burke. The defendant said his name was Willie Gilchrist, and gave the officers the names of his father and mother in Spartanburg, South Carolina. The officers showed him a photograph of Willie Gilchrist in Spartanburg. The defendant said he was his half brother, and that he had the same name. They then placed him in the county jail.

The next morning between 10:00 and 11:00 a.m. the defendant was carried to the office of Captain Burke. Lieutenant Henry C. Carter of the Winston-Salem Police Department and Detectives Landon and Smith were present. The defendant made a statement, which was taken down in longhand by Detective Landon and later transcribed by typewriter. Defendant was afterwards given a transcribed copy of his statement, and it was read to him. The defendant said it was correct and signed it. The statement defendant made to the officers is, in substance, as follows: His name is Marion Frank Crawford. He is 26 years old. He was born in Spartanburg, South Carolina, on 10 June 1936. He was serving 20 years in prison in South Carolina for cutting Max Swain and fracturing his skull. He escaped on 27 or 29 July and came to Winston-Salem. He told Sandra Denise Marshall that he was going to a store to get some ice cream. He started walking toward the store, and she followed him. When he reached the store, he went inside and purchased a pack of cigarettes for himself and a bar of candy for her. She waited on the outside of the store. When he came out of the store, they walked up the street and then into an open field. He told her to lie down. He took her pants off. He got on top of her and had sexual intercourse with her. She started to scuffle, and everything went blank.

She started to scream and he put his hand over her mouth. When he took his hand off of her mouth, she said "Uncle Willie" and did not say anything else. He said to himself, "Lord, what have I done?" He believed she was dead. He left, went around part of the field, came back by Free Street, went up on the corner, and talked with some people. He then left the corner, went back and picked Sandra up and carried her back up the branch towar' Free Street and around the back of 808 Willow Street and on up to a fence. He placed her body on the wires near a post. He hung her jacket on the fence. He jumped over the fence, pulled her over the fence, and placed her in the graveyard near an old tree. He then left. The next day he went back to the graveyard and moved her body, placing it near an old tree lying on the ground. He laid her panties on her and then placed an old wagon over her with the sides down. She scuffled because "she wasn't used to it, and it caused her to scuffle." The State introduced in evidence the written statement signed by defendant, which is practically identical with the oral statement which Lieutenant Carter testified defendant made. Later the defendant carried the officers to the place where he finally left Sandra's dead body.

The defendant offered no evidence.

Defendant assigns as error the admission in evidence of his confession, and the admission in evidence of the written copy of his confession signed by him.

It is hornbook law that a voluntary confession is admissible in evidence against the one making it; an involuntary confession is not. A confession is voluntary in law when, and only when, it was in fact voluntarily made. *S. v. Davis*, 253 N.C. 86, 116 S.E. 2d 365; *S. v. Livingston*, 202 N.C. 809, 164 S.E. 337. A confession otherwise voluntary is not rendered involuntary and therefore incompetent by the mere fact that the accused at the time of making the confession was under arrest or in jail or in the presence of armed officers. *S. v. Rogers*, 233 N.C. 390, 64 S.E. 2d 572, 28 A. L. R. 2d 1104; *S. v. Litteral*, 227 N.C. 527, 43 S.E. 2d 84; *S. v. Bennett*, 226 N.C. 82, 36 S.E. 2d 708; *S. v. Thompson*, 224 N.C. 661, 32 S.E. 2d 24; *S. v. Wagstaff*, 219 N.C. 15, 12 S.E. 2d 657; *S. v. Stefanoff*, 206 N.C. 443, 174 S.E. 411; *S. v. Gray*, 192 N.C. 594, 135 S.E. 535; *Culombe v. Connecticut*, 367 U.S. 568, 6 L. Ed. 2d 1037, 1050-1053, and note 38 on p. 1051. When Lieutenant Carter testified defendant made a statement, defendant challenged its admissibility in evidence. Whereupon, the trial judge had a preliminary inquiry and afforded both the State and the defendant a reasonable opportunity to present evidence in the absence of the jury showing the circumstances under which the confession was made. *S. v. Rogers*,

supra; S. v. Gibson, 216 N.C. 535, 5 S.E. 2d 717; *S. v. Whitener,* 191 N.C. 659, 132 S.E. 603.

Defendant's counsel cross-examined Lieutenant Carter at length. The record discloses that Lieutenant Carter told defendant, before he made any statement, that he did not have to make any statement whatever, unless he wanted to, and that if he did make any statement, it could be used against him or for him in court, and that he was entitled to an attorney, and could use the telephone if he wanted to. Defendant made no request. After defendant's counsel had finished his cross-examination of Lieutenant Carter, the trial judge asked him: "Is there anything more that you want to offer to (sic) this preliminary examination? Are there any more questions that you want to ask him?" Defendant's counsel replied, "No, your Honor." Defendant offered no evidence on the preliminary inquiry.

The record tends to show that defendant's confession was the product of an essentially free and unconstrained choice by him, and entirely voluntary. There is nothing in the record to show the contrary. Defendant in his brief has no statement or argument that his confession was not voluntary. The trial judge found, upon a consideration of all the evidence offered on the preliminary inquiry, that defendant's confession was voluntarily made and then admitted it in evidence. The competency of the confession was a matter for the trial judge. He ruled it admissible, and this ruling is supported by competent evidence. *S. v. Rogers, supra; S. v. Hairston,* 222 N.C. 455, 23 S.E. 2d 885; *S. v. Manning,* 221 N.C. 70, 18 S.E. 2d 821; *S. v. Alston,* 215 N.C. 713, 3 S.E. 2d 11. No error in this respect has been made to appear in the record. In addition, no error has been made to appear in the record in the admission in evidence of defendant's written confession signed by him.

Defendant has other assignments of error to the admission of evidence. However, in his brief he has neither reason nor argument stated or authority cited in support of these assignments of error. They present no new question, merit no discussion, and after having been carefully examined are all overruled.

Defendant assigns as error the denial of his motion for judgment of nonsuit.

"Rape is the carnal knowledge of a female, *forcibly* and *against her will.*" *S. v. Jim,* 12 N.C. 142. This was the early definition of the crime, and it is still a correct definition of the crime. *S. v. Johnston,* 76 N.C. 209; *S. v. Marsh,* 132 N.C. 1000, 43 S.E. 828; *S. v. Johnson,* 226 N.C. 671, 40 S.E. 2d 113. Our statute, G.S. 14-21, also makes it rape carnally to know and abuse any female child under the age of twelve years, even though she consents. *S. v. Storkey,* 63 N.C. 7; *S. v. Johnston,*

supra; S. v. Johnson, supra; S. v. Jones, 249 N.C. 134, 105 S.E. 2d 513; *S. v. Strickland,* 254 N.C. 658, 119 S.E. 2d 781.

G.S. 14-17 provides: "A murder * * * which shall be committed in the perpetration or attempt to perpetrate any * * * rape, * * *, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury." *S. v. Grayson,* 239 N.C. 453, 80 S.E. 2d 387; *S. v. King,* 226 N.C. 241, 37 S.E. 2d 684; *S. v. Mays,* 225 N.C. 486, 35 S.E. 2d 494.

This Court said in *S. v. Mays, supra*: "When a homicide is committed in the perpetration of the capital felony of rape the State is not put to proof of premeditation and deliberation. Proof that the homicide was committed in the perpetration or attempted perpetration of the felony of rape is all that is required. *S. v. Dunheen,* 224 N.C. 738."

The indictment here charges the capital felony of murder in the language prescribed by statute. G.S. 15-144. In *S. v. Mays, supra,* the Court said: "The bill of indictment charges the capital felony of murder in the language prescribed by statute. G.S. 15-144. It contains every averment necessary to be made. *S. v. Arnold,* 107 N.C. 861; *S. v. R. R.,* 125 N.C. 666. Proof that the murder was committed in the perpetration of a felony constitutes no variance between *allegata* and *probata. S. v. Fogleman,* 204 N.C. 401, 168 S.E. 536. If the defendant desired more definite information he had the right to request a bill of particulars, in the absence of which he has no cause to complain." See also *S. v. Maynard,* 247 N.C. 462, 101 S.E. 2d 340; *S. v. Scales,* 242 N.C. 400, 87 S.E. 2d 916; *S. v. Streeton,* 231 N.C. 301, 56 S.E. 2d 649.

The general rule is well settled in North Carolina, and it seems also in this nation, that a naked extrajudicial confession of guilt by one accused of crime, uncorroborated by any other evidence, is not sufficient to warrant or sustain a conviction. *S. v. Long,* 2 N.C. 455; *S. v. Cope,* 240 N.C. 244, 81 S.E. 2d 773; *S. v. Thomas.* 241 N.C. 337, 85 S.E. 2d 300; Anno. 127 A. L. R. 1131, where the cases are assembled.

The State has offered this evidence, *aliunde* of defendant's confession, of the *corpus delicti*: About 4:00 p.m. on Sunday, 18 November 1962, defendant came to the home of Vera Sanders, mother of Sandra Denise Marshall. Sandra was born 14 August 1954. He stayed about 15 minutes, and then he and Sandra went out the house about the same time. That was the last time Vera Sanders saw Sandra alive. About 4:00 or 4:15 p.m. on the same afternoon, defendant and Sandra went to the home of Eloise Finney. They stayed three or four minutes, and, as Eloise testified, "he just took her by the hand, and they both

went out my back door." On the afternoon of 26 November 1962, police officers of the city of Winston-Salem found Sandra's dead body in a graveyard in the Happy Hill Garden section. This graveyard was grown over with briers, honeysuckle vines, weeds, and trees. Her dead body was in a hole under a tree that had blown over and pulled up some dirt as it was blown over. The dead body and the hole were covered with leaves and honeysuckle vines and a small toy wagon. Her body was fully clothed, except for her panties which were under the body. Defendant in his confession stated he took Sandra's pants off before he had sexual intercourse with her, that he laid her pants on her dead body, and placed an old wagon over her dead body with the sides down. Defendant afterwards carried police officers to the place where they found Sandra's dead body. Dr. Geoffrey Mann, an exceptionally well-qualified pathologist, performed a port-mortem examination on Sandra's body, examining her body from head to toe, inside and out. His testimony is to the effect that there had been a forcible entry into Sandra's vagina by some foreign object, applied with considerable force, that many of the little air sacs which make up the lungs had been exploded, and he expressed the opinion that she came to her death as a result of suffocation by pressure being applied to her mouth and nose. Defendant in his confession said when Sandra started to scream he put his hand over her mouth, and when he took his hand off of her mouth, she said "Uncle Willie," and did not say anything else. The testimony of Dr. W. D. Vreeland, a licensed medical doctor in North Carolina and county coroner, is that he examined Sandra's dead body in the Kate Bitting Hospital morgue in Winston-Salem and found her vagina gaping open widely, and that it definitely appeared to be injured, and that in his opinion Sandra died from suffocation and shock due to trauma. In our opinion, and we so hold, the State has offered in evidence sufficient extrinsic corroborative circumstances, as will, when taken in connection with defendant's confession, suffice to show that defendant murdered Sandra Denise Marshall in the perpetration of rape, and to sustain the conviction. The trial court properly submitted the case to the jury.

The trial court began its charge to the jury by reading the indictment, by instructing the jury as to the legal effect of a plea of not guilty, and by giving a correct definition of the term "a reasonable doubt." He then instructed the jury:

> "It is the province of the jury, and the sole province of the jury, to determine what the facts are in the case and, as the Court will hereafter instruct you, to exercise a discretion in the question of punishment. You determine what the facts are from all of the evi-

dence that is offered in the case, determining what the truth is and, then, you take the law as it is announced by the Court and apply it to the facts as you find them, and thereby arrive at your verdict, (A) allowing your verdict, insofar as it is humanly possible, to speak the truth, which is the very meaning of the word, 'verdict,' itself, and do this, Members of the Jury, without sympathy or without prejudice towards any person. (B)"

Defendant assigns as error the above part of the charge between the letters (A) and (B).

The trial court then instructed the jury that they could return one of three verdicts: Guilty of murder in the first degree as charged in the indictment, and that if they returned this verdict, the defendant's punishment will be death; or guilty of murder in the first degree with a recommendation that the defendant be punished by life imprisonment, and that if they returned this verdict, defendant's punishment will be life imprisonment; or not guilty. The court then read to the jury G.S. 14-17, with the proviso: "If at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury."

A little further on in its charge the court instructed the jury:

"Now, gentlemen, the Court instructs you that under that statute, Chapter 14, Section 17, and under the law of this State, if you find the prisoner guilty of murder in the first degree - - - and you will understand that the Court is not suggesting that you so find - - - you may, at the time of returning your verdict into open court, recommend that the prisoner's punishment shall be life imprisonment, and, in which case, your verdict would be guilty of murder in the first degree with the recommendation that the prisoner's punishment shall be life imprisonment. And the Court instructs you that in such an event, the prisoner's punishment shall be automatically fixed at life imprisonment. This right that you have is an unbridled right; it is absolute in you, and it is without any restrictions, conditions, or limitations whatever."

In closing its charge, the court instructed the jury:

"If you return a verdict of murder in the first degree, the Court instructs you now, as it has already instructed you, that you may at the time of returning your verdict into open Court, recommend that the prisoner's punishment be imprisonment for life, and in that event, the punishment will be imprisonment for life. You are

instructed that this is a right that you have that is unbridled and that is without conditions, restrictions, or limitations. You may return one of three verdicts in the case.

"1. Guilty of murder in the first degree as charged in the bill of indictment.

"2. Guilty of murder in the first degree with a recommendation that the punishment of the prisoner be life imprisonment.

"3. Not guilty.

depending upon how you, the jury, find the facts under the evidence and the Court's instructions as to the law."

The trial court correctly instructed the jury, as required by the proviso contained in G.S. 14-17. *S. v. McMillan*, 233 N.C. 630, 65 S.E. 2d 212; *S. v. Carter*, 243 N.C. 106, 89 S.E. 2d 789; *S. v. Denny*, 249 N.C. 113, 105 S.E. 2d 446.

Defendant contends that the challenged part of the charge, to the effect that the jury should arrive at its verdict so as to speak the truth, and to do this without sympathy or prejudice to anyone, was in effect an instruction to the jury that they should not show any sympathy to him, and deprived him of the right vested in the jury by the proviso contained in G.S. 14-17 to exercise an absolute and "unbridled discretionary right" to recommend for him life imprisonment, if they convicted him of murder in the first degree. With this contention we do not agree.

The admonition or cautionary instruction that the jury should arrive at their verdict "without sympathy or without prejudice towards any person" was given in what may be termed the prologue to the charge, and in this prologue to the charge the court instructed the jury: "It is the province of the jury, and the sole province of the jury, to determine what the facts are in the case and, as the court will hereafter instruct you, to exercise a discretion in the question of punishment." A study of this introductory cautionary instruction leads us to the opinion that the part of the charge complained of could hardly have been understood otherwise by the jury than as having reference to the duty of the jury in arriving at their verdict on the primary question before them, namely, whether the defendant was guilty or not guilty of the crime charged in the indictment. The court, after the challenged part of the charge, instructed the jury that they could return one of three verdicts; that if they returned a verdict of guilty of murder in the first degree with a recommendation that the defendant be punished with life imprisonment, his punishment will be life imprisonment, and read to them G.S. 14-17. A little later in the charge

the court instructed the jury that its right to recommend life imprisonment, if they convicted the defendant of first degree murder, "is an unbridled right; it is absolute in you, and it is without any restrictions, conditions, or limitations whatever," and in the conclusion of the charge the court gave substantially the same instruction. A reading of the charge as a whole (*S. v. Burgess,* 245 N.C. 304, 96 S.E. 2d 54) leads us to the conclusion that the charge could leave the jury in no doubt that relief from the death penalty, if they convicted defendant of first degree murder, was committed without limitation of any kind to their discretion, and that there is no reasonable ground to believe the jury was misled or misinformed.

A jury should not convict or acquit a defendant by reason of sympathy or prejudice. If there was sympathy here, it would seem that it was for Sandra Denise Marshall and her tragic death, and if there was prejudice here, it would seem it would be against the defendant, and cautioning the jury against sympathy and prejudice under the facts here in arriving at a verdict of guilty or not guilty was not harmful to defendant. It would seem that it is the duty of a court to caution the jury against sympathy and prejudice in arriving at a verdict of guilty or not guilty whenever the circumstances require it. *People v. Botkin,* 9 Cal. App. 244, 98 P. 861; *Doyle v. State,* 39 Fla. 155, 22 So. 272; *Kirchman v. State,* 122 Neb. 624, 241 N.W. 100; *State v. Trapp,* 56 Ore. 588, 109 P. 1094; *S. v. Barton,* 70 Ore. 470, 142 P. 348; *Commonwealth v. Cisneros,* 381 Pa. 447, 113 A. 2d 293; *State v. Malloy,* 79 S.C. 76, 60 S.E. 228; *S. v. Harsted,* 66 Wash. 158, 119 P. 24; 53 Am. Jur., Trial, sec. 822; 88 C. J. S., Trial, sec. 297, b, Cautionary Instructions, p. 809. See *S. v. Fulkerson,* 61 N.C. 233; *S. v. McCarter,* 98 N.C. 637, 4 S.E. 553. In *Daniel v. United States,* 268 F. 2d 849, the Court said: "Admonitions against prejudice and sympathy are part of the boiler plate of a criminal charge." The assignment of error to the charge is overruled. There is no other assignment of error to the charge.

The record shows no evidence of murder in the second degree or of manslaughter. The trial court properly limited the possible verdicts to those set out in the record. *S. v. Mays, supra.*

Lieutenant Henry C. Carter testified that Sandra was "a little girl." The pathos of this little eight-year-old girl's last words, "Uncle Willie," after she had been brutally ravished and was dying from suffocation by reason of the explosion of many little air sacs, which made up her lungs, caused by pressure applied to her mouth and nose by the 26-year-old defendant, haunts the mind. The facts here recall to memory the words of the apostle James, which have come ringing down the

centuries: "When lust hath conceived, it bringeth forth sin: and sin, when it is finished, bringeth forth death." The Epistle of James, Ch. 1, v. 15—King James Version.

All defendant's assignments of error are overruled. In the trial below we find

No error.

Appendix B

NORTH CAROLINA	)	
	)	IN THE SUPERIOR COURT
FORSYTH COUNTY	)	
MARION FRANK CRAWFORD, Petitioner	)	
	)	JUDGMENT OF
—vs—	)	POST CONVICTION
	)	HEARING
STATE OF NORTH CAROLINA, Respondent	)	

This matter coming on for hearing upon a petition filed herein by one Marion Frank Crawford, a State Prison inmate, who in his application for a Post Conviction hearing under N.C. G.S. 15-217, et seq., alleges that his constitutional rights have been violated in his trial which took place in the Superior Court of Forsyth County in 1963 at the February term. Crawford, the petitioner herein, was charged in a bill of indictment by the Grand Jury of Forsyth County with the first degree murder of one Sandra Denise Marshall and now seeks in this proceeding a constitutional review of the trial and conviction had therein.

The petitioner is present in open court with his attorneys, Mr. F. B. McKissick and Mr. Moses Burt, licensed attorneys in the State of North Carolina, and the State is represented in this proceeding by the Solicitor of the District.

When this case was first called to be heard, the petitioner, through counsel, requested a continuance for the reason that one witness was unable to be present in court. Upon examina-

tion of the Court, it was found that these facts were true and the continuance was granted. When this matter came on for hearing at this term, the petitioner again requested a continuance; however, the Court found as a fact that the witness could appear in court and it is noted that the witness did appear and testify in open court.

Based upon the application filed by the petitioner herein, the Court notes with particularity that the petitioner alleges his constitutional rights were violated in the trial of his case at the February, 1963 term in Forsyth County Superior Court by:

1. His being tried for a felony while suffering from a serious mental disorder.

2. That his confession was involuntary.

3. That he did not have competent counsel.

4. That he was denied due process of law by the manner in which his attorney represented him in the trial of the case.

5. That he was denied due process of law because he was never adequately informed of the serious charges against him prior to his trial.

6. That the indictment returned by the Grand Jury of Forsyth County was invalid.

7. That the petitioner was denied the constitutional right to a trial by an impartial jury representing a cross-section of the community.

8. That petitioner's rights were violated by the Solicitor's failure to accept a plea of guilty from the petitioner.

9. That petitioner was denied the right to take the stand in order that he might testify in his own behalf.

10. That the petitioner's constitutional rights of appeal were denied him.

11. That N. C. G. S. 14-17 is unconstitutional.

12. That the death penalty in capital felonies in North Carolina criminal proceedings is cruel and unusual punishment and is only reserved for members of the Negro race by the State of North Carolina, all of which is a violation of this petitioner's constitutional rights.

Based upon all the evidence tendered by the petitioner, and his witnesses, and his own testimony, and learned argument by the petitioner's counsel and also based on all the evidence proffered by the State and the State's witnesses, the record of the original trial, which includes the transcript of testimony, the transcript of juror examination, the oral arguments of the defendant's counsel and the State Solicitor to the jury and the Judge's charge, and all other evidence and testimony proffered at this hearing, the Court makes the following findings of fact:

I.

That the petitioner herein, through counsel, filed a duly executed petition for a Post Conviction hearing under the N. C. G. S. 15-217.

II.

That, as a result of the filing of the application for a Post Conviction hearing in which constitutional questions were alleged, the Solicitor of Forsyth County Superior Court did answer same as provided by law.

III.

That as a result of the issues being joined, the matter came on for hearing in open court with all parties to the action present and the petitioner represented by counsel.

IV.

That the Court finds as a fact that Marion Frank Crawford was apprehended by Sgt. Landon and Sgt. Smith, Negro police officers of the Winston-Salem Police Force along with Lt. Carter, a detective with the Winston-Salem Police Force on November 29, 1963 at 11:30 P.M. The Court further finds as a fact that the police officers brought Crawford to the police department where he was placed in the Winston-Salem City Jail after being identified by name and age at approximately midnight on November 29, 1963. This Court further finds as a fact that on the night of the 29th of November, the police officers only arrested and placed in custody in the jail, the defendant Crawford. There was no interrogation, questioning or inquiries pertaining to the murder and rape of Sandra Denise Marshall on this night. That on the morning of the 30th of November at 10:00 A.M., the same officers inquired of Crawford if he desired counsel and advised him that he did not have to make any statement. Further, this Court finds that Crawford was fully advised of his constitutional rights to have an attorney if he so desired and that these constitutional rights were made known to him prior to and before any questions or interrogatives were directed to him in regard to the crime of murder and rape.

V.

This Court further finds that the defendant Crawford on November 30, 1963, at approximately 10:15 A.M. did understandingly and knowingly and voluntarily make a statement which was a confession after being advised of his constitutional

rights to counsel and to remain silent if he so desired. That it is further found by this Court that the statement made by Crawford was made by him without any promise of leniency by any law enforcement officer or official or the Solicitor of the County of Forsyth. Still further, there was no force, duress or coercion used in the obtaining of this confession.

VI.

The petitioner herein has had the voluntariness of this confession reviewed by the Superior Court Judge who tried this case at the February, 1963 term of court, at a "voire dire" examination held in the jury's absence and also by the Supreme Court of North Carolina when this case was reviewed then on appeal. The opinion of the Court is found in Volume 260 at Page 548 of the *North Carolina Supreme Court Reports.* The petitioner has not shown at any time, including this proceeding, that the petitioner's rights were in any way violated in regards to his confession and the circumstances surrounding same. This Court finds as a fact that the confession of Marion Frank Crawford obtained by the police officers on November 30, 1963 was voluntarily and understandably given after the petitioner had been fully advised of his constitutional rights. That the petitioner said in his confession that he had been worried and unable to sleep and that he had planned to give himself up.

VII.

The petitioner's counsel at his trial in February, 1963 was a Negro attorney who was appointed by the Court to represent the defendant in the trial of the murder charge which was outstanding against him at the February, 1963 term. This Court finds as a fact that the petitioner was comprehensively, learnedly and competently represented in the trial had at the February, 1963 term. This Court further finds that Mr. Hosea

Price, the appointed attorney, was careful in the selection of the jury. During the course of this trial, the attorney made many objections and exceptions to the admission of evidence and thoroughly cross-examined the State's witnesses.

VIII.

This Court further finds as a fact that Mr. Hosea Price is an excellent and outstanding trial lawyer, having practiced in the Forsyth County Superior Court and surrounding Superior Courts and other inferior courts for over thirty years; that Mr. Price is a capable, competent, experienced and learned attorney and he has represented many defendants in serious felony cases and many defendants in capital felony cases, and many plaintiffs and defendants in civil matters. That this Court further finds that Mr. Price interviewed witnesses, investigated this case thoroughly, talked with the State's witnesses, did research in regards to the law in this case and was well prepared for trial when this cause came on for trial in the February, 1963 term. The Court further finds that the Winston-Salem Police Department cooperated with Mr. Price and made available to him all of the evidence they had against the petitioner. That the petitioner was in no way prejudiced by the fact that he did not have counsel at the preliminary hearing as all the evidence of the State was made available to counsel appointed for petitioner prior to the trial.

IX.

That there is no evidence that the petitioner was denied due process of law by the manner in which his attorney represented him in the trial of his case. In fact, all of the evidence overwhelmingly refutes this allegation. This Court finds that this petitioner did have due process of law and the same is reflected clearly by the manner, procedure and able representation which was afforded this defendant by his counsel.

X.

The Court finds that the petitioner is sane and was not suffering from a psychotic mental disorder at the time of the trial or at the time of the commission of the murder of Sandra Denise Marshall; that the petitioner knew the difference between right and wrong and knew the nature and consequences of his acts at that time. That Marion Frank Crawford has a personality type which many criminals have — a defect in character. That the petitioner has a normal level of intelligence with a full scale I.Q. of 94.

XI.

This Court finds as a fact that the psychiatrist who testified in this case, Dr. Owen, is a learned and competent psychiatrist who has had over thirty years experience in the field of psychiatry and who, at one time, was the Superintendent of the State Mental Hospital and was also the Assistant Superintendent of the said hospital and who has also enjoyed an extensive private practice.

XII.

This Court further finds as a fact that the officers who arrested the petitioner informed him of the charge of which he was being detained under, which was a warrant for the murder of Sandra Denise Marshall, and that the execution and service of same is reflected on the warrant, all of which appears in the record filed herein. That the petitioner knew of this charge, as same is reflected in his confession which was given less than eleven hours after his arrest.

XIII.

This Court finds as fact that the indictment in this case

which was returned a true bill of indictment, by the duly constituted Grand Jury of Forsyth County, at the February, 1963 term, clearly and adequately charges the defendant with murder as is authorized by G. S. 15-144. That this fact has been reviewed by the Supreme Court of North Carolina and is reflected in their opinion in 260 N.C. 548, (1963). It is a further judicial fact herein, that the petitioner is a member of the Negro race and that the Grand Jury and Grand Juries of Forsyth County for over a period in excess of twenty-five years have been constituted with members of the Negro race thereon. It is also a matter of record that many prospective Negro jurors were examined by the defendant and his counsel in the trial of this case. The record also reflects that two members of the Negro race were on the jury panel which returned the verdict against this defendant at the February, 1963 term.

XIV.

The petitioner herein has shown that by figures and statistics, more members of the Negro race have been executed in capital offense cases in North Carolina than white defendants. Also, there was shown by the petitioner's evidence that more Negro defendants were charged with felony offenses and capital offenses than white defendants. This Court, however, finds as a fact that the petitioner has not shown any discrimination on the part of the State of North Carolina in charging this defendant with the capital offense charge in this case. This Court finds as a fact that the record consistently shows the defendant Crawford to be a member of the Negro race, who was charged by Negro officers for the murder of a young Negro girl, tried by a jury with Negroes on it and represented during the trial by a Negro attorney. There was no evidence that the petitioner has shown any design, nor scheme, nor prejudice, nor discrimination on the part of the State of North Carolina because of the race and nationality of this defendant. The record shows the defendant was charged for the murder of Sandra Denise

Marshall and that justice requires the perpetrator of such a heinous offense to be tried under the laws of the land.

XV.

The petitioner has introduced into evidence and this Court has allowed same to come into evidence many newspaper articles which were printed prior to the defendant's trial in February, 1963, during his trial in February, 1963 and subsequent to his trial in February, 1963. This Court finds as a fact that the petitioner's constitutional right of a fair and impartial trial was not in any way abridged or violated or prejudiced as a result of these newspaper articles. The jurors were thoroughly examined in regards thereto as appears in the record. In fact, all the records in evidence reflect that the petitioner had a fair and impartial trial, free of any constitutional violation in regards thereto.

XVI.

This Court finds as a fact there is no constitutional right either in the North Carolina Constitution nor in the United States Constitution, that a defendant may enter a plea of guilty to a crime when the State, within its discretion, refuses to accept the plea of guilty. The State of North Carolina, through its Solicitor, has the discretion of either accepting a plea of guilty or not accepting it. There is no evidence in this record, nor in the original trial, which reflects or tends to reflect an abuse of discretion. In fact, this Court finds that the Solicitor charged the defendant with the offense of murder in the first degree and proceeded to trial as he is authorized by law and that he did not abuse his discretion in refusing to accept petitioner's tender of plea of guilty.

XVII.

The petitioner herein complains that his constitutional rights

were violated by his attorney's choice of not placing the defendant on the stand to testify in the initial trial. This Court finds as a fact that the choice of the attorney in not placing his client on the witness stand was well-founded in this case as there was no evidence the defendant could testify to or offer which would be helpful to him and by not using the defendant as a witness, the defendant was not subjected to cross-examination. That defendant's counsel did not put any witnesses on the stand because there were none whose evidence would have been helpful to the defendant.

XVIII.

This Court finds as a fact that the petitioner was not denied the right to appeal. In fact, the Supreme Court of North Carolina, as a result of the appeal entered by the defendant's attorney, thoroughly and comprehensively reviewed the petitioner's trial and same is reflected in 260 N. C. 548, *State vs. Crawford*, 1963.

XIX.

The petitioner alleges that a judgment of death by asphyxiation is a cruel and unusual punishment in capital offense cases. This Court finds as a fact that death by asphyxiation is not a cruel and unusual punishment for a defendant tried and convicted for an offense of murder in the first degree. The General Assembly of the State of North Carolina has the power and authority under the North Carolina Constitution and the United States Constitution to pass a law which authorizes punishment in capital offense crimes. This is even the law and punishment in the Federal system. The North Carolina Supreme Court has repeatedly held that death by asphyxiation as a result of a trial and conviction in a capital offense case is constitutional. The Supreme Court of North Carolina has also ruled that North Carolina G. S. 14-17 is constitutional

and that punishment as is outlined therein is not cruel and unusual.

Upon the foregoing findings of fact, the Court makes the following conclusions of law:

I.

That the petitioner was represented by, and had the effective assistance of, able and experienced counsel during the trial of his case in February, 1963, and in the appeal of the case to the Supreme Court of North Carolina. That the petitioner received a fair and impartial trial in which all of his constitutional rights were fully preserved and protected.

II.

That petitioner was not denied any of his constitutional rights at any time prior to, during, or subsequent to his trial in February, 1963.

III.

That G. S. 14-17 is constitutional.

IV.

That the petitioner is properly in the custody of the State Prison Department.

Upon the foregoing findings of fact and conclusions of law, it is therefore ORDERED, ADJUDGED and DECREED that the petition of the petitioner for a new trial be and the same is hereby denied. It is further ORDERED that the petitioner be remanded to the custody of the State Prison Department.

This the ..... day of March, 1965.

.....

JUDGE OF SUPERIOR COURT

Appendix C

8 September 1965

Messrs. McKissick & Burt
Attorneys at Law
213½ W. Main
Durham, North Carolina

Re: STATE v CRAWFORD (MARION FRANK)
No. 411, Fall Term 1965

Gentlemen:

Petition for writ of certiorari in the above entitled case is filed with the following order:

> "DENIED by the order of the Court in conference 9/7/65."

Sincerely yours,

Adrian J. Newton
Clerk of the Supreme Court

AJN:cjd

cc Honorable T. W. Bruton, Attorney General

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

CIVIL — NO. 1515

MARION FRANK CRAWFORD, Petitioner,	)	OPINION AND ORDER DENYING APPLICATION FOR WRIT OF HABEAS CORPUS AND VACATING STAY OF EXECUTION
v.	)	
K. B. BAILEY, Warden, Respondent.	)	

This is an amended application by Marion Frank Crawford, a state prisoner, for a writ of habeas corpus and order staying the execution of sentence of death. It appears from the verified application and prior records submitted in proceedings involving this same petitioner that he was tried for first-degree murder at the February 1963 Term of Forsyth County Superior Court and a sentence of death was imposed. The judgment was affirmed by the North Carolina Supreme Court in State v. Crawford, 260 N.C. 548, 133 S.E. 2d 232 (1963).

At 9 a.m. on January 10, 1964, one hour before the scheduled execution, petitioner, through counsel employed by others in his behalf, filed an application with this court for a writ of habeas corpus alleging an unconstitutional restraint. The court entered an order staying execution of the death sentence pending a determination of the merits of petitioner's application. It appeared that petitioner had not presented to the state courts the constitutional questions raised in his application to this court; hence, this court by order of October 21, 1964, continued the stay of execution pending further orders of this

court and allowed petitioner thirty days within which to institute appropriate proceedings in the state courts to collaterally attack the conviction.

On November 16, 1964, petitioner through his attorney filed in the Superior Court of Forsyth County, North Carolina, an application for a review of his conviction pursuant to N. C. Gen. Stat. §§ 15-217 to -222. An evidentiary hearing on the allegations made in petitioner's application was held on February 19, 1965, and the post-conviction court on May 11, 1965, made findings of fact and conclusions of law and entered an order denying petitioner's request for a new trial. The Supreme Court of North Carolina denied certiorari on September 7, 1965.

Having exhausted state remedies as required by the order of this court, petitioner on November 12, 1965, through his attorney, filed an "amended petition for habeas corpus" with this court. It is that petition which the court now considers in determining whether to continue or to vacate the stay of execution granted petitioner upon his first application to this court.

Petitioner does not allege any facts in his amended application. He merely recites the chronology of proceedings dating from his initial application in this court in January 1964, then concludes in the following language:

> "That as a result of the foregoing, the petitioner has exhausted his state remedies without the unconstitutionality of his state court trial being redressed.
>
> "WHEREFORE, your petitioner has filed an amended application for Writ of Habeas Corpus and respectfully prays as follows:
>
> "1. That a Writ of Habeas Corpus be directed to the

Respondents issued on his behalf so that the petitioner will be presented before this court.

"2. That the Respondents should appear an answer to this petitioner.

"3. That after full and complete hearing, this court will relieve petitioner of the unconstitutional detention, imprisonment, and sentence of death.

"4. That Respondents be further ordered to stay the execution of the judgment of death as heretofore set out and refrain from other action in this case."

When petitioner's first application for habeas relief was before this court we said:

"* * * When available state remedies have not been exhausted, the federal district courts are constrained by consideration of comity to defer action until the state courts have had the opportunity to correct a constitutional violation * * * *

"This court is reluctant to interfere with state administration of criminal justice. The states have the primary responsibility to prevent criminal conduct; and, with few exceptions, citizens look exclusively to the states for protection against crime. It would seem particularly appropriate in this case, where a state prisoner, convicted of murder and sentenced to death, claims that the State has infringed constitutional rights in its administration of criminal justice and prevention of criminal conduct, for the court to abstain until the state courts have had an opportunity to pass upon the constitutional questions raised." Crawford v. Bailey, 234 F. Supp. 700, 702 (E.D.-N.C. 1964).

Following this court's abstention, the state courts have passed upon petitioner's constitutional claims. In the present posture of this case, we are properly concerned with a review of the state court's adjudication of the petitioner's federal claim. We are not bound by the state court's determination, nor its finding of fact, nor its conclusions of law. Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed. 2d 837 (196); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d (1963). But if comity between the federal and state courts has any meaning and substance, the federal court, when it chooses to abstain, should, upon a subsequent application, concern itself with the collateral proceedings in the state courts to ascertain if petitioner's constitutional claims were properly resolved.

Nowhere in petitioner's amended application to this court, filed after the denial of relief by the state post-conviction court, does he allege any facts tending to show that he was denied a full and fair evidentiary hearing by the state court upon his constitutional claim, nor that the state court erred in its findings of the basic, primary, or historical facts, nor that the state court failed to apply correct federal constitutional standards to its findings of fact. See Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed. 2d 770 (1963). Petitioner relies solely upon conclusory allegations without any factual basis for the relief sought.

An application for post-conviction relief by way of habeas corpus which states only bald conclusions with no supporting factual allegations is legally insufficient and may be denied without hearing. Sanders v. United States, 373 U.S. 1, 19, 83 S.Ct. 1068, 10 L.Ed. 2d 148; 28 U.S.C.A. § 2242.

An amended application, as indeed an original application, must stand on its own bottom. There must be factual allegations to support the claim of constitutional infirmity. Only thus can the federal court determine whether the claim is prima

facie meritorious or patently frivolous.[1] The court should not be compelled to go beyond the application itself to learn what the contentions are, nor undertake a voyage of discovery to ferret out some unspecified error. Such a procedure would place an intolerable burden upon the courts. The common sense requirements of factual allegations is a rule of necessity and must be applied impartially in every case.

It appearing to the court, therefore, that petitioner has obtained a review of his conviction in a collateral state proceeding as required in the prior order of this court; that relief therein was denied, and that the Supreme Court of North Carolina has denied certiorari; and that petitioner has filed an amended application for habeas corpus with this court, but has failed to allege any facts in support of his contention that his custody violates the Constitution of the United States; and the court being of the opinion that petitioner's application is legally insufficient.

It is, therefore, ORDERED that the application for a writ of habeas corpus be and it is hereby denied.

It is FURTHER ORDERED that the stay of execution granted by this court on January 10, 1964, and continued on October 21, 1964, be and it is hereby vacated.

1. Although the amended application is wholly devoid of any factual allegations entitling petitioner to relief, nevertheless this court has examined the petition filed in the collateral proceeding, the brief of counsel for petitioner, and the judgment of the state court denying relief, all of which were filed with the court by petitioner's counsel. It appears that the state courts have made a determination of all of petitioner's federal questions. No errors are discernable upon the face of the record.

This 18th day of January, 1966.

s/ Algernon L. Butler
Chief Judge, U. S. District Court

A True Copy, Teste:
Samuel A. Howard, Clerk
By Norma G. Blackman
Deputy Clerk

Appendix E
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,981.

Marion Frank Crawford,
Appellant,

versus

V. Lee Bounds, Warden of Central Prison (Successor to K. B. Bailey),
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH.
ALGERNON L. BUTLER, CHIEF JUDGE.

(Argued October 3, 1967. Decided April 11, 1968.)

Before HAYNSWORTH, Chief Judge, and SOBELOFF, BOREMAN, BRYAN, WINTER, CRAVEN and BUTZNER, Circuit Judges.*

M. C. Burt, Jr. (McKissick & Burt on brief) for Appellant; William Van Alstyne as Amicus Curiae; Daniel H. Pollitt (Charles F. Lambeth, Jr., on brief) for the North Carolina Civil Liberties Union, as Amicus Curiae, and

* The case was argued initially, on January 12, 1967, before a panel of the Court consisting of Bell and Winter, Circuit Judges, and Russell, District Judge. Because Judge Bell died before decision in the case and because of the importance of the issues, the Court, on its own motion, ordered reargument en banc.

Ralph A. White, Jr., Staff Attorney, Office of the Attorney General of North Carolina Thomas Wade Bruton, Attorney General of North Carolina, and Theodore C. Brown, Jr., Staff Attorney, Office of the Attorney General of North Carolina on brief) for Appellee.

WINTER, Circuit Judge:

Petitioner, a thirty-year-old male Negro, was convicted of first degree murder of an eight-year-old female Negro child, occurring in the course of the commission of rape, allegedly perpetrated by him November 18, 1962.[1] N.C. Gen.Stat. § 14-17. Petitioner was found guilty and, because the jury's verdict contained no recommendation for mercy, petitioner was sentenced to death. On appeal, the judgment entered on petitioner's conviction was affirmed. *State* v. *Crawford*, 260 N. C. 548, 133 S.E.2d 232 (1963).

About an hour prior to the time that capital punishment was to be carried out, petitioner sought a writ of habeas corpus from the district court. He obtained a stay of execution, but he was remitted to available state remedies, not then exhausted. The district court retained jurisdiction until state exhaustion had occurred. Petitioner sought post-conviction relief and was afforded a plenary hearing, where he was represented by court-appointed counsel. N.C.Gen. Stat. § 15-217. Relief was denied him and the issuance of a writ of certiorari was denied by the Supreme Court of North Carolina. He then renewed his application for a writ of habeas corpus in the district court, which, after considering it, the record extract and briefs of the appeal in his

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[1] Petitioner was also indicted for rape, itself a capital offense under the laws of North Carolina. N.C. Gen. Stat. § 14-21. He has never been tried on this indictment.

original trial, and the transcript of the state post-conviction proceeding (excluding the exhibits admitted at that hearing), summarily denied him relief.[2]

Before the district judge, petitioner advanced numerous contentions why the judgment entered on his conviction was invalid. He claimed, generally, that he was denied due process of law, in that he was never adequately informed of the charges against him and was convicted of a crime with which he was not charged, and that he was denied his right to indictment by grand jury because the prosecutor was permitted to amend the indictment to include matters not presented to the grand jury; that he was denied his right to a trial by an impartial jury because the prosecutor was permitted to challenge for cause prospective jurors who expressed sentiments against capital punishment; that he was denied due process because the prosecutor refused to accept a plea of guilty with sentence of life imprisonment; that he was denied due process because the prosecutor announced, prior to trial, that he would seek the death penalty, the prosecutor introduced irrelevant evidence at the trial for its inflammatory effect on the jury, told the jury of petitioner's prior criminal record, and pleaded with the jury for the death penalty; that he was denied a fair trial because inflammatory evidence, including pictures of the deceased's body and her private parts, was exhibited to the jury; that he was denied effective assistance of counsel because a lawyer was not appointed to represent him before the preliminary hearing and, when his court-appointed

[2] Before petitioner's application was considered on its merits, an amended application was dismissed for failure to state a claim on which relief could be granted. We reversed, *Crawford* v. *Bailey*, 360 F. 2d 596 (4 Cir. 1966), with directions to allow the filing of a supplemental petition incorporating previous allegations by reference. Such a supplemental petition was filed on remand. It was the supplemental petition, incorporating all previous allegations, that was dismissed.

counsel was appointed, he represented petitioner incompetently; and that the North Carolina statute relating to the death penalty is unconstitutional on its face and in its application to members of the Negro race.

Most of these claims of invalidity were pressed at the state post-conviction hearing and evidence was offered in support of many of them. Absent any suggestion of waiver or deliberate bypass, and there is none, petitioner has exhausted his available state remedies in regard to the contentions made before the district court. *Stem* v. *Turner,* 370 F.2d 895 (4 Cir. 1966); *McNeil* v. *State of North Carolina,* 368 F.2d 313 (4 Cir. 1966). We conclude that petitioner is entitled to a writ of habeas corpus because his constitutional rights were violated by the manner in which the jury to determine his criminal responsibility was selected, and particularly because the prosecutor was allowed successfully to challenge prospective jurors for cause who expressed sentiments against capital punishment and thus to disqualify a substantial segment of the panel, without the additional determination being made that their objections to capital punishment would preclude them from rendering a fair verdict on the issue of guilt.[2a] We confine our consideration, therefore, to that issue.[3]

[2a] We take note that on January 15, 1968, the Supreme Court granted certiorari in *Witherspoon* v. *Illinois,* No. 344 Misc., 36 L. W. 3286 (January 16, 1968), and *Bumper* v. *North Carolina,* No. 678 Misc., 36 L. W. 3286 (January 16, 1968), 36 L. W. 3298-3299 (January 23, 1968), in which substantially the same question is presented. We, nevertheless, deem it appropriate to express our views.

[3] We do not suggest that petitioner's other contentions either possess or lack merit. It suffices that we see no constitutional bar to retrial. Since petitioner's original trial counsel was granted leave to withdraw from representation of petitioner, even prior to the Federal Court proceedings, our decision renders moot the claim of denial of effective representation of counsel. We assume, on retrial, that with alert and competent counsel, petitioner will have full opportunity to litigate vigorously (1) any attempt of the state to use the

It is undisputed that members of the panel, from which the jury that convicted petitioner was chosen, were interrogated as to whether they had any sentiment or reservation against capital punishment; and any who expressed any such sentiment or reservation were, at the request of the prosecutor, immediately excused for cause without further inquiry. Thirty-four of seventy-five prospective jurors were disqualified on this broad ground. None of these thirty-four was asked whether his scruples against capital punishment would interfere in any way in the determination of petitioner's guilt or innocence. Thus, 45.33% of the cross-sectional panel was eliminated from service on the petit jury because of a conscientious scruple toward capital punishment without inquiry as to what effect, if any, their scruples would have on their ability to decide the issue of petitioner's guilt or innocence.[4] Moreover, four veniremen were peremptorily challenged by the prosecution after preliminary questioning established that they were less than firm believers in capital punishment. Including these four, thirty-eight out of seventy-five veniremen (50.66% of the total) were thus excluded from petit jury service for these reasons.

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photographs complained of here under *State* v. *Foust*, 258 N. C. 453, 128 S.E. 2d 889 (1963); (2) any attempt of the state to repeat the argument complained of here under *Hall* v. *United States*, 150 U.S. 76 (1893), and *Wagner* v. *United States*, 263 F. 2d 877 (5 Cir. 1959), (3) the sufficiency of the indictment and notice to petitioner under *McClure* v. *State*, 267 N. C. 212, 148 S.E. 2d 15 (1966), and (4) any other procedural or substantive issues that counsel deem advisable to raise, all under the authorities cited and any others pertinent to those issues.

[4] The percentage is startlingly close to the results of a 1966 Gallup Poll which showed 47% of those interviewed were opposed to capital punishment. The results of the poll were adopted and reported in *Task Force Report: The Courts*, The President's Commission on Law Enforcement and Administration of Justice (1967) 27. The results of the poll were summarized in the main report of the Commission, *The Challenge of Crime in a Free Society* (1967) 143.

In sharp contrast to the 45.33% of excluded jurors, a juror who admitted that he had "more or less, a fixed opinion" about the case as a result of reading about it in the newspaper was permitted to serve after the trial judge questioned him and elicited the further answers that the juror could "erase" the opinion from his mind, and that he could "disabuse" his mind of the opinion, and decide the case solely on the evidence adduced in court, applying thereto the court's instructions, so as to give the state and petitioner a fair trial. The challenge of defense counsel for cause was denied.

Thirty-one jurors were accepted by the prosecutor. Only thirteen were actually empaneled, but each of the thirty-one professed a belief in capital punishment. Indeed, one of the thirteen stated that he believed "in the doctrine of an eye for an eye," and that he believed it would be his *duty* to sentence a defendant found guilty of murder to capital punishment. Thus, while no person known to entertain even an unexamined scruple regarding the death penalty was permitted to qualify, a juror known to regard a sentence of death as his "duty" was permitted to serve.

In permitting the veniremen in petitioner's case to be examined on *voir dire* as to their reservations or sentiments against capital punishment and excusing them on challenge for cause if they evidenced conscientious scruples against imposition of capital punishment, the original trial judge proceeded in accordance with established North Carolina practice, approved over sixty-three years before. *State* v. *Vick,* 132 N. C. 995, 43 S.E. 626 (1903); *State* v. *Vann,* 162 N. C. 534, 77 S.E. 295 (1913); *State* v. *Arnold,* 129 S.E.2d 229 (1963), rev'd. on other grounds, 376 U. S. 773 (1964). See also, *State* v. *Manning,* 251 N. C. 1, 110 S.E. 2d 474 (1959) (concurring opinion); *State* v. *Childs,* 269

N. C. 307, 152 S.E.2d 453 (1961). It is significant that the *Arnold* and *Childs* cases arose and were decided after a 1949 amendment to the criminal statutes of North Carolina which permitted, for the first time, a jury in a prosecution for first degree murder upon a determination of guilt to exercise a choice between the imposition of death or life imprisonment. Theretofore death was the exclusive and inevitable judgment to be entered on a jury's verdict of guilt of first degree murder.

The text of the 1949 amendment is set forth in the margin and consists of the emphasized portion of N.C.Gen.Stat. § 14-17.[5] The function of the jury under the amendment has been considered in many decisions. In *State* v. *McMillan*, 233 N. C. 630, 65 S.E.2d 212 (1951), it was held that an instruction to the jury that the statute gave them the right to recommend life imprisonment "if they feel that under the facts and circumstances of the crime alleged to have been committed by the defendant, they are warranted and justified in making that recommendation" and that if they did not feel "under the facts and circumstances" that such a recommendation was warranted, they should act accordingly, vitiated an otherwise valid conviction in which

[5] "§ 14-17. Murder in the first and second degree defined; punishment.—A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: *Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury.* All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." (emphasis supplied)

Similar language was added to N.C. Gen. Stat. §§ 14-21, 14-52 and 14-58 at the same time. These statutes provide optional penalties of death or life imprisonment for rape, first degree burglary and arson, respectively.

a verdict, without recommendation was returned. The vice in the instruction was, the Court said, that it placed unauthorized restrictions upon the discretion vested in the jury:

> "The language of this amendment stands in bold relief. It is plain and free from ambiguity and expresses a single, definite and sensible meaning,—a meaning which under the settled law of this State is conclusively presumed to be the one intended by the Legislature. * * *
>
> "It is patent that the sole purpose of the act is to give to the jury in all cases where a verdict of guilty of murder in the first degree shall have been reached, the right to recommend that the punishment for the crime shall be imprisonment for life in the State's prison. * * * *No conditions are attached to, and no qualifications or limitations are imposed upon, the right of the jury to so recommend. It is an unbridled discretionary right.* And it is incumbent upon the court to so instruct the jury. In this, the defendant has a substantive right. Therefore, any instruction, charge or suggestion as to the causes for which the jury could or ought to recommend is error sufficiently to set aside a verdict where no recommendation is made." (emphasis supplied) *Id.*, 65 S.E.2d, at p. 213.

The consistency with which North Carolina has adhered to the rule of "unbridled discretion" was fully documented in the concurring opinion of Justice Denny in *State* v. *Pugh*, 250 N. C. 278, 108 S.E.2d 649 (1959), which discussed the twelve cases which arose between the date of the statute and 1959. Review of all of them is unnecessary. It suffices to say that in *State* v. *Simmons*, 234 N. C. 290, 66 S.E.2d 897

(1951), it was held erroneous to characterize to the jury that the statute imposed a "duty" to consider recommending life imprisonment; in *State* v. *Dockery*, 238 N. C. 222, 77 S.E.2d 664 (1953), it was held reversible error for the prosecutor to argue against life imprisonment because of the possibility of parole; in *State* v. *Denny*, 249 N. C. 113, 105 S.E.2d 446 (1958), it was held error for the judge to tell the jury that it could not consider the death penalty, where the prosecutor had stated that he was not seeking the death penalty; and in the *Pugh* case it was held error for the trial judge to state the ultimate contention of the prosecutor that mercy should not be recommended. The later decided cases of *State* v. *Manning, supra,* and *State* v. *Christopher,* 258 N. C. 249, 128 S.E.2d 667 (1962), are fully in accord.

Petitioner argues that the practice of obtaining a so-called "death-qualified" jury, by the allowance of successful challenge for cause of all persons with conscientious scruples against capital punishment, interferes with the "unbridled discretion" of the jury. This is a question of state law which we consider settled adversely to petitioner's contention by *State* v. *Arnold, supra,* and *State* v. *Childs, supra.*[6] Petitioner also argues that the practice of obtaining

[6] The North Carolina Supreme Court has not addressed itself specifically to the argument that the scope of "unbridled discretion" is so broad and the jury so clearly entitled to exercise it for reasons *dehors* the record, that as a matter of statutory construction a juror should be free to recommend life imprisonment because of a conscientious belief against capital punishment; but in its latest decision, *State* v. *Childs,* 269 N. C. 307, 152 S.E. 2d 453, 461 (1967), has impliedly rejected it, saying: "It is a general rule that the State in the trial of crimes punishable by death has the right to an impartial jury, and in order to secure it, has the right to challenge for cause any prospective juror who is shown to entertain beliefs regarding capital punishment which would be calculated to prevent him from joining in any verdict carrying the death penalty."

"Death-qualified" juries offends current concepts of due process and equal protection of the laws.

At the outset, we think that petitioner would be entitled to the writ because of the inherently unfair manner in which the jury was selected in this case. Our recitation of the proceedings exposes two salient facts (1) a venireman who thought it was his "duty" to impose capital punishment in the event of conviction was permitted to serve, while those whose dictates of conscience would presumably feel a converse duty were summarily excluded from service, and (2) a venireman who had reached an opinion about the case, prior to trial, was interrogated by the trial judge until his qualification to serve was established, while those who admitted to scruples against capital punishment were dismissed without further interrogation. We cannot escape the conclusion that, as a result of insufficient interrogation and a double standard of inquiry, the petit jury selected was at the outset more likely to impose capital punishment in the event of conviction than not. The unexamined "duty" of one member of the panel may have been so strong that no verdict of guilt, except one imposing capital punishment, could have been returned. Certainly, the concept of "duty," standing alone, carries that inescapable inference. Petitioner was, therefore, denied due process of law in violation of the Fourteenth Amendment.

That the Fourteenth Amendment guarantees "to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors" is established by *Irvin* v. *Dowd,* 366 U. S. 717, 722 (1961). Prejudice, bias or other basic form of predisposition on the part of the trier of the fact results in a denial of due process. *Re Murchison*, 349 U. S. 133 (1955); *Re Oliver*, 333 U. S. 257 (1948); *Tumey* v. *Ohio*, 273 U. S. 510 (1927); *Reynolds* v. *United States*, 98 U. S.

145 (1879). Where North Carolina has chosen to make the degree of punishment a jury question in the event of conviction, as in the instant case, the guaranty that a juror be "impartial, 'indifferent,'" is as applicable to the issue of punishment as to the issue of guilt. To permit a juror whose mind is foreclosed on one side of that issue to serve, while eliminating those who think to the contrary, and to exert special effort to qualify one whose mind may be foreclosed on the issue of guilt; while freely excusing those who indicate a predisposition as to punishment, were not the ways to achieve the constitutional objective. Denial of equal treatment in the manner of selection inevitably resulted in denial of due process.

Stroud v. *United States*, 251 U. S. 15 (1919), 251 U. S. 380 (1920), is a case directly in point with what was done in regard to the juror who felt himself under a "duty" to impose capital punishment in the event of conviction. There it was said that a challenge should be sustained to a juror whose testimony "made it reasonably certain that, in the event of conviction for murder in the first degree, he would render no other verdict than one which required capital punishment." *Id.*, 251 U. S., p. 381. See also, *Reynolds* v. *United States, supra.* It is true that in Stroud the court's failure to sustain the challenge was held not reversible error because the accused had been afforded more peremptory challenges than he was entitled to by law and the accused had challenged peremptorily the juror in question, so that, in the view of the Court, it could not be said that the accused's right to challenge peremptorily was abridged. Here, petitioner was afforded only the number of peremptory challenges permitted him by law, and he consumed them all in the selection of the jury. Unlike *Stroud,* there is no ground to say that petitioner was not prejudiced.

While our decision may be rested on the narrow ground that, by reason of the manner of selection of the jury, petitioner was denied due process of law, this record reflects a more significant denial of constitutional right and one which is not correctible on retrial under North Carolina law and practice as they now prevail. Since we order petitioner's retrial, it is appropriate to rest our decision on the systematic exclusion of jurors in violation of the equal protection guaranty resulting from the disqualification of jurors to try the issue of guilt who expressed reservations about the imposition of capital punishment lest we be understood at some later stage of this case, or in a comparable proceeding, to have given our implied approval to it.

In addressing ourselves to this basis of decision, we are met at the outset with the vast array of judicial authorities which have approved the existence of beliefs regarding capital punishment as a proper ground for disqualification of jurors for cause in capital cases. As the cases collected in Annotation, *Juror-Capital Punishment Scruples*, 48 A.L.R. 2d 560 (1965), demonstrate, and the annotator states:

> "Upon the theory that conscientious scruples against infliction of the death penalty under any circumstances, or equivalent beliefs, equally disqualify a juror for cause in a prosecution for a capital crime, whether the law prescribes the single punishment of death upon conviction, or invests the jury, upon conviction, with a discretionary power to assess death or life imprisonment according to the evidence and circumstances, the rule has become generally accepted that where the jury is vested with such discretion the state may challenge for such cause because it is entitled to the maximum penalty if the proof shall justify it, and to con-

tend throughout the trial and finally to the jury that the character of the crime justifies it."

A thorough analysis of the state of the law was made in *United States* v. *Puff*, 211 F.2d 171 (2 Cir. 1954), where Puff was found guilty of first degree murder without recommendation for mercy under 18 U.S.C.A. § 1111, the federal statute which directs that an accused determined "guilty of murder in the first degree, shall suffer death unless the jury qualifies its verdict by adding thereto 'without capital punishment,' in which event he shall be sentenced to imprisonment for life." Twelve talesmen had been excused for disclosed scruples against capital punishment. Puff sought reversal of the judgment, arguing that, since a jury should be a cross-segment of society, a scruple of fixed belief for or against capital punishment in murder cases was not a disqualification for jury service in a murder case and, therefore, the excuse of talesmen on that ground resulted in an unbalanced jury not truly reflecting contemporary social thought. His contention was rejected and the judgment affirmed.

In arriving at this result, the court reviewed the cases prior to the enactment of the Act of January 15, 1897, 29 Stat. 487, which first permitted the jury to recommend life imprisonment in a first degree murder case, as well as those subsequent to the enactment of the statute. In the latter group the only Supreme Court decision is that of *Stroud* v. *United States, supra,* where it was said that a juror should be excused for cause if, from his preliminary examination, it was reasonably certain that, in the event of conviction for murder, the juror would render no other verdict than one which required capital punishment. From the *Stroud* case, the Court of Appeals in *Puff* reasoned

that if jurors with bias in favor of capital punishment are disqualified, jurors with bias against the death penalty should be similarly disqualified.[7] The Court concluded that all federal decisions were contrary to Puff's contention.

The Court next considered the decisions of the state courts. It noted three cases[8] in which the defendants argued that the modification of a statute under which the death penalty was mandatory by provision for an alternative punishment by imprisonment with power in the jury to decide between the two alternatives impliedly repealed the disqualification for scruples against capital punishment which had theretofore existed, but where the argument was rejected; it also noted two courts which had held that a challenge for cause on that ground would not lie.[9] The Court collected further the many other decisions in states having statutes similar to the Act of January 15, 1897 in which, absent the specific contentions made in the five courts to which reference has been made, it had been held that scruples against capital punishment are a proper ground for disqualification for cause. Following its reference to this imposing array of authority, the Court stated:

> "It will be noted that all the cases above cited stem from the fundamental theory that the American jury should be composed of impartial jurors. As a result, a party is entitled to an array of impartial jurors to

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[7] This statement in *Stroud* was dictum because, as appears from an examination of both opinions in the same case, the juror to whom reference was made was in fact peremptorily challenged.

[8] *State* v. *Owen*, 73 Idaho 394, 253 P. 2d 203 (1953); *Rhea* v. *State*, 63 Neb. 461, 88 N.W. 789 (1902); *State* v. *Riley*, 126 Wash. 256, 218 P. 238 (1923).

[9] *State* v. *Lee*, 91 Iowa 499, 60 N.W. 119 (1894); *State* v. *Wilson*, 234 Iowa 60, 11 N.W. 2d 737 (1943); *State* v. *Garrington*, 11 S. D. 178, 76 N.W. 326 (1898).

which he may direct his peremptory challenges. To this a party is entitled as of right. But granted this, a party is entitled to no more. Having no legal right to a jury which includes those who because of scruples or bias he thinks might favor his cause, he suffers no prejudice if jurors, even without sufficient cause, are excused by the judge. Only if a judge without justification overrules a challenge for cause and thus leaves on the panel a juror not impartial, does legal error occur." *Id.*, pp. 184-185.

The Court then turned directly to Puff's contention that the Act of January 15, 1897 should be interpreted to except the general doctrine that scruples against capital punishment constitute a ground of disqualification for cause from application to cases arising under the Act—in other words, that the Act impliedly eliminated scruples or bias against capital punishment as disqualification for cause and sanctioned "balanced juries," which might properly include jurors with such scruples. This argument was rejected, with this statement:

"It will readily be seen that this 'balanced' jury, which the defendant envisages, is in reality 'a partisan jury': if, as he urges, it may include jurors with bias or scruples against capital punishment it must—if it is to have 'balance'—include also those with bias in favor of the death penalty as the punishment for murder. It is settled by Andres v United States, 333 US 740, 68 S Ct 880, 92 L ed 1055, that under the Statute the verdict must be unanimous both as to guilt and as to punishment. As a result, as Mr. Justice Frankfurter noted in his concurring opinion, 333 US at page 766,

68 S Ct at page 892, 93 L ed at page 1070, any juror 'can hang the jury if he cannot have his way' as to the sentence which *he* deems appropriate. These considerations lead to the conclusion that trials before 'balanced juries,' even on unanimous findings of guilt, would frequently result in disagreements. And disagreements on successive trials would result in practical immunity from murder. We cannot believe that the Statute was intended to have such a tendency." *Id.*, p. 185.

We have recited at length the reasoning of the Second Circuit in *Puff* because its chain of logic and the authorities which it cites provide the context of our decision today. But in *Puff* there was not recognition that what constitutes partiality of a juror on the issue of punishment does not necessarily constitute partiality of a juror on the issue of guilt, and *Puff* was not decided on a record which developed the substantial systematic exclusion which, by virtue of prevailing community sentiment; inevitably results when jurors, disqualified as to the issue of punishment, are considered to be disqualified automatically as to the issue of guilt. *Puff* established the rule that when a sentencing procedure requires a jury to assess guilt and fix punishment in a single simultaneous verdict, necessarily, a juror, having bias as to punishment, is biased as to guilt. This thesis we reject; and as we later note, even if jury sentencing is established, there are alternatives to the single verdict system when the result thereof is to deny a constitutional right.

In reaching a conclusion opposite to the one reached in *Puff*, we recognize that *Puff* has been uniformly followed by other courts, both state and federal. See, *e. g.*, *Pope* v. *United States*, 372 F.2d 710 (8 Cir. 1967); *Turberville* v. *United States*, 303 F.2d 411 (D.C. Cir.), cert. den., 370

U. S. 946 (1962);[10] *Commonwealth* v. *Subilosky*, ... Mass. ....., 224 N.E.2d 197, 203 1967); *State* v. *Laws*, 50 N. J. 159, 233 A.2d 633, 646 (1967).

The North Carolina Supreme Court has recently addressed itself to this problem, and held that the inability of a juror to join in a verdict *imposing the death penalty* is sufficient ground for disqualification from the jury which is to determine the defendant's guilt or innocence. *State* v. *Childs, supra,* 152 S.E.2d at 461. In other words, under current North Carolina practice, a prospective juror with conscientious objections to capital punishment is automatically barred from jury service in a capital case, regardless of whether or not he would render a fair verdict on the issue of guilt alone. The same result was reached in *People* v. *Riser*, 47 Cal.2d 566, 305 P.2d 1 (1957), where the facts placed the issue in particularly clear focus. In that case, a challenge for cause was sustained when the prospective juror stated on *voir dire* that he was against capital punishment, that in no event would he join in a verdict imposing the death penalty, but that his objection would not preclude him from finding the defendant guilty.[11]

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[10] At this point it should be noticed that the prosecution in *Turberville* occurred under the District of Columbia statutes at a time that capital punishment was mandatory. D.C. Code § 22-2404 (1961 Ed.). Statements in the case contrary to our holding here are thus dicta.

[11] California has adhered to the *Riser* holding, even after the enactment by statute of a two-trial procedure in capital cases. See, *e.g.*, *People* v. *Gilbert*, 63 Cal. 2d 690, 408 P. 2d 365 (1965). It has not yet been decided in New York, which adopted a statutory two-trial procedure like California's, whether the cases which arose prior to the enactment of the statute and which held that conscientious objections to capital punishment are a *per se* disqualification in a capital case, see, *e.g.*, *People* v. *Fernandez*, 301 N. Y. 302, 320-21, 93 N.E. 2d 859 (1950), are still valid. It has been suggested that the establishment of the two-trial system should remove this ground for disqualification if the prospective juror would nevertheless be able to join in a guilty verdict. See Note, 39 N.Y.U.L. Rev. 50. In our view, such a result may be constitutionally compelled, depending upon the substantiality in the number of disqualifications which result from a contrary rule.

Many of the authorities cited above have been primarily concerned with statutory interpretation of state laws relevant to the question of whether disqualification of a juror on the ground of conscientious objection to capital punishment has been impliedly revoked by the abolishment of a mandatory death sentence under certain circumstances. However, to the extent that these authorities stand for the proposition that a prospective juror in a capital case may be constitutionally disqualified simply for holding sentiments against capital punishment where death is not the only punishment and where the effect of juror disqualification is to eliminate a substantial portion of the jury venire, we reject them, also.[12]

Among the states, there is wide debate as to the abolition or retention of the death penalty.[13] Divers states have resolved the problem in diverse ways, from outright or partial abolition of capital punishment to a system whereby a jury may fix or recommend imposition or non-imposition of capital punishment. We do not enter into the merits of this controversy. Within the framework of the Federal and State Constitutions, the propriety of capital punishment, and

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[12] Further, we reject the argument in *Turberville*, adopted in *Pope*, that our inquiry is at an end if we find no systematic exclusion in the general venire because the guaranty against systematic exclusion does not extend to the selection of a particular jury panel. We do not quarrel with the general proposition that a defendant does not have the right to have every element of the community represented on the jury which tries him. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217 (1946). But under the practice existing in North Carolina, as freely conceded by its counsel, jurors expressing any conscientious scruple against capital punishment are as surely and certainly excluded from any panel serving in such a case as if they had been excluded from membership on the venire. Where inevitably such jurors will be excused from petit jury service, it is no answer to say that petitioner's rights were not violated because they were members of the array from which the jury to try him was chosen.

[13] *The Challenge of Crime in a Free Society*, p. 143, op. ft. 4, *Task Force Report: The Courts*, p. 27, op. ft. 4.

when it is to be imposed, are questions reserved for legislative judgment, and the questions are not judicial unless some constitutional guaranty is violated. Nor do we intimate that persons who believe that capital punishment has its function and place are or are not more easily persuaded of guilt—more "conviction-prone"—than those who oppose it. The Second, Eighth and District of Columbia Circuits and the North Carolina Supreme Court have rejected the due process argument that a defendant is prejudiced by being subjected to a trial before a jury, all the members of which do not believe in the abolition of capital punishment.[14] We, believing that it is unnecessary to a proper disposition of this case, do not consider it.

Where we depart from prior decisions is that we do hold that belief against capital punishment on the part of jurors who are vested with a dichotomy of functions—the determination of the issue of guilt, and, if guilt is found, the degree of punishment to be imposed—cannot be allowed to disqualify a substantial part of the venire when it is not established that the views of the persons so disqualified will preclude them from making a fair determination on the issue of guilt, aside from the issue of punishment. Such disqualification prevents the jury in its function of determining the issue of guilt from being fairly representative of the community, and thus violates equal protection of the laws.

We need not look far for support for the principle that systematic exclusion of any recognizable, identifiable group within the community from which a jury venire is drawn violates the equal protection clause, irrespective of a show-

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[14] *United States* v. *Puff, supra; Pope* v. *United States, supra; Turbeville* v. *United States, supra; State* v. *Childs, supra.* Contra: Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?* 39 Tex. L. R. 545 (1961).

ing of prejudice. Systematic exclusion, as an invidious practice, has most usually been stricken down where exclusion was based on color, *e. g., Smith* v. *State of Texas,* 311 U. S. 128 (1940); *Eubanks* v. *Louisiana,* 356 U. S. 584 (1958); *Arnold* v. *North Carolina,* 376 U. S. 773 (1964); *Chesnut* v. *New York,* 370 F.2d 1, 7 (2 Cir. 1966); sex, *Glasser* v. *United States,* 315 U. S. 60 (1940); *Ballard* v. *United States,* 329 U. S. 187 (1946); economic status, *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217 (1946); *Labat* v. *Bennett,* 365 F.2d 698, 719-24 (5 Cir. 1965); or national origin, *Hernandez* v. *Texas,* 347 U. S. 475 (1954). See also, *Fay* v. *New York* 332 U. S. 261 (1947) (dissenting opinion), which would have disapproved the use of "blue ribbon" juries. The thrust and breadth of the statements employed in condemning these obvious forms of exclusion in some of these cases are worthy of examination in testing the validity of the practice followed in the case at bar, as measured by its result.

In *Glasser*, there was exclusion of women from the grand jury and alleged exclusion of certain women, from the petit jury. Although the conviction was not set aside for either exclusion (because, as to the grand jury, women had been eligible to serve as jurors for only two months at the time the indictment was returned and because, as to the petit jury, there was a failure of proof), the Court made the following significant statement in regard to the composition of a jury:

> "For the mechanics of trial by jury we revert to the common law as it existed in this country and in England when the Constitution was adopted. Patton v. United States, 281 US 276, 74 L ed 854, 50 S Ct 253, 70 ALR 263. But even as jury trial, which was a

privilege at common law, has become a right with us, so also, whatever limitations were inherent in the historical common law concept of the jury as a body of one's peers do not prevail in this country. Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' Smith v Texas, 311 US 128, 130, 85 L ed 84, 86, 61 S Ct 164.

"Jurors in a federal court are to have the qualifications of those in the highest court of the State, and they are to be selected by the clerk of the court and a jury commissioner. Judicial Code, §§ 275, 276; 28 USCA §§ 411, 412. This duty of selection may not be delegated. United States v. Murphy (DC) 224 F 554; Re Special Grand Jury (DC) 50 F(2d) 973. And, its exercise must always accord with the fact that the proper functioning of the jury system, and indeed, our democracy itself, *requires that the jury be a 'body truly representative of the community,' and not the organ of any special group or class.* If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But *they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community. Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial,*

and should be sturdily resisted." (Emphasis supplied) *Id.*, pp. 85-86.

Ballard also concerned exclusion of women from the grand jury which indicted the defendants and the petit jury which found them guilty. On this ground the defendants' convictions were reversed, with the Court saying:

> "It is said, however, that an all male panel drawn from the various groups within a community will be as truly representative as if women were included. The thought is that the factors which tend to influence the action of women are the same as those which influence the action of men—personality, background, economic status—and not sex. *Yet it is not enough to say that women when sitting as jurors neither act nor tend to act as a class. Men likewise do not act as a class.* But, if the shoe were on the other foot, who would claim that a jury was truly representative of the community if all men were intentionally and systematically excluded from the panel? *The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables.* To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. The exclusion of one may indeed make the jury less representative of the community than would be true if an economic or racial group were excluded." (emphasis supplied) *Id.*, pp. 193-194.

Thiel was a case in which the exclusion was based on economic grounds. Persons who worked for a daily wage

were not listed as prospective jurors, as a class, because it was thought jury service imposed a financial hardship on them and experience demonstrated that they were usually reluctant to serve and, accordingly, were excused by the trial judge. The case was a civil suit for money damages and the jury returned a defendant's verdict. A new trial was ordered because of the "* * * admitted wholesale exclusion of a large number of wage earners in disregard of the high standards of jury selection." *Id.*, p. 225.

In commenting on the proper composition of a panel from which a jury is drawn, the Court said:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, *necessarily contemplates an impartial jury drawn from a cross-section of the community.* Smith v. Texas, 311 US 128, 130, 85 L ed 84, 86, 61 S Ct 164; Glasser v. United States, 315 US 60, 85, 86 L ed 680, 707, 62 S Ct 457. This does not mean, of course, that every jury must contain representatives of all economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury." (emphasis supplied) *Id.*, p. 220.

Of course, the *Glasser, Thiel* and *Ballard* cases were decided under the supervisory power of the Supreme Court of the United States over lower federal courts and not avowedly as an announcement of constitutional doctrine. They are, nevertheless, pertinent authorities on the constitutional issue, because each depended upon the authority of *Smith* v. *State of Texas, supra*, a decision resting solely on constitutional principles, as authority for the result reached and, over the years, they have generally been so regarded. See, *e. g., Brooks* v. *Beto, supra*, p. 11.

North Carolina's practice of excluding persons from the jury selected to determine an accused's guilt or innocence, merely because they have some sentiment or reservation against capital punishment, without any determination that their beliefs would affect their ability to decide the issue of culpability, cannot stand under these Supreme Court decisions condemning systematic exclusion.[14a] In this case,

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[14a] Explicit and implicit in the separate concurrence of Judge Sobeloff is the argument that petitioner lacks standing to claim a denial of equal protection except as a denial of equal protection mounts up to a denial of due process. It would be shocking to suppose that petitioner is not opposed to capital punishment, at least for himself. More importantly, he, as a defendant in a capital case, has been denied equal treatment with that afforded defendants in non-capital cases who are not tried by juries selected in part by the jurors' notions of punishment; and, as this opinion demonstrates, there is no proper basis for having a death-qualified jury try the issue of his guilt or innocence. Thus, on two scores, he is a member of a class which has been unconstitutionally discriminated against.

Moreover, in such cases as this traditional restrictive rules as to standing are on the wane, if indeed they are still viable. In *Glasser* v. *United States, supra*, the standing of a male defendant to challenge exclusion of women was not questioned; and in *Ballard* v. *United States, supra*, the conviction of a male defendant was reversed because of the exclusion of women. In *Rabinowitz* v. *United States*, 366 F. 2d 34 (5 Cir. 1966), the conviction of a white defendant was reversed because of the manner of selection of grand and petit juries which operated to exclude Negroes. Admittedly, these decisions did not proceed on constitutional grounds, but the majority opinion in *Fay* v. *New York, supra*, which did proceed on constitutional grounds, recognized that "[T]here may be special cases" [332 U. S. 293] where a defendant who is a member of a class not excluded may complain of the exclusion of a class to

we are told by the representatives of the Attorney General of North Carolina that 30% of any array of veniremen truly representative of the North Carolina community would be ineligible to serve in a capital case, because they have conscientious scruples against capital punishment and because, under North Carolina practice, they would be excused from service for cause. Indeed, in the instant case 45.33% of the prospective jurors were disqualified on this ground. We do not know the color, or the sex, or the economic status of those who would be disqualified, or those remaining who would be considered qualified. We do not, and need not, know that in determining guilt or innocence they would act as a class. *Ballard* v. *United States, supra.* We know only that such a substantial percentage of the populace generally is different from the remaining populace in having a different basic concept of punishment in even the most heinous crimes which may stem, as pointed out in *Turbeville* v. *United States, supra;* from divers and diverse reasons, from unshakable religious convictions to intellectual or philosophical distaste. Such a group would comprise a variety of views and a variety of approaches and, if allowed to serve, may well have a "subtle interplay of influence" upon the others. *Ballard* v. *United States, supra,*

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which he does not belong. A defendant in a capital case would seem to present such a "special case." *Allen* v. *State,* 110 Ga. App. 56, 137 S.E. 2d 711 (1964), and *State* v. *Madison,* 240 Md. 265, 213 A. 2d 880 (1965), both cited with approval in *Labat* v. *Bennett, supra,* pp. 723-724, reject the traditional requirement of standing. The note, *The Defendant's Challenge To a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection,* 74 Yale L. J. 919, 931-941 (1965), suggests that discretionary application of the principle of *jus tertii* or "impure standing" may be invoked in appropriate cases as an alternative to a requirement of "pure standing," even if the main thesis of the author that racial exclusionary jury cases should be grounded on the due process clause, rather than the equal protection clause, is rejected. The facts before us would lead us to conclude that the instant case is an appropriate one in which *jus tertii* standing should be invoked. All of these reasons lead us to conclude that petitioner has standing

p. 194. As a group it would seem as readily identifiable as the wage earners in *Thiel* v. *Southern Pacific Co., supra.*

The exclusion of all persons from the jury in a capital case who hold conscientious objections to capital punishment cannot be justified on the ground that it is necessary for the effectuation of the interest of an accused and the interest of society in having a fair and impartial jury determine the guilt or innocence of the accused on the facts as presented to them, and who are not influenced in their judgment by extraneous beliefs regarding one of the possible punishments which might be imposed. There, of course, can be no doubt as to the legitimacy of this interest. But it can be served by the exclusion of a much narrower group than that which was excluded in the instant case—the exclusion of only those whose beliefs would impair their impartiality in determining guilt aside from the question of punishment. It is precisely for this reason that the *voir dire* inquiry should not cease after a determination that the prospective juror is opposed to capital punishment, but should further ascertain whether this opposition would preclude him from making a fair determination on the issue of guilt.

If a prospective juror's conscientious objection to one of the forms of punishment which the statute allows are so severe as to render him unable to participate, with an open mind, in the jury's deliberations on the culpability of the accused, he is properly challengeable—and should be challenged—for cause. He has demonstrated that he is not an impartial, "indifferent" juror. On the other hand, if a prospective juror with conscientious objections can, in spite of these objections, make an impartial determination on the issue of guilt, his exclusion, if the class to which he belongs become substantial, works to deny to the defendant his

right to have his case judged by a jury representative of the community without serving any recognizable, legitimate interest of the state. Objections to capital punishment may be based on many different stages of belief, and involve subtle nuances of conscience. The function of *voir dire* should be to explore these nuances to determine whether the prospective juror would be able to participate fairly in the deliberations on the issue of guilt, confining his judgment to the facts as presented. Under the equal protection clause, *voir dire* cannot be a blunt instrument of systematic exclusion of a widespread segment of the community whose views do not interfere with the interest which the state seeks to protect.

It is clear that the real interest which the state is seeking to protect by the *voir dire* practice followed in the instant case is the preservation of capital punishment, as one possible punishment, though not exclusive. This interest provides no firmer justification for the systematic exclusion of a substantial portion of the community from a jury determining the defendant's guilt or innocence. Again, we do not question the legitimacy of this interest, and we do not doubt that permitting persons with conscientious objections to capital punishment to sit on a jury which is both to determine the guilt or innocence of the defendant and to impose his punishment in a capital case may result in some cases in effective nullification of the death penalty. We are also aware of the danger that if jurors, while agreeing upon the guilt of the defendant, adopt intransigent positions on the issue of punishment, no verdict on either guilt or punishment will be returned since a single verdict is required under North Carolina law, and that this might "result in practical immunity from murder" if occurring in successive trials, *United States* v. *Puff, supra.* But, the state has *no*

constitutional right to the imposition of capital punishment in any case; and a defendant *has* a constitutional protection against systematic exclusion. Moreover, the state's non-constitutional interest can be served by more narrow measures than the systematic exclusion of a large segment of the community from serving on a jury which is to determine the guilt or innocence of the defendant, and thus such exclusion cannot be deemed necessary to effectuate a valid state interest so as to save it under the equal protection clause.

Other states have avoided or dealt with the problem in other ways. In a minority of the states the problem would not arise because the sentencing function is vested solely in the judge. In the majority of the states, the jury is empowered to recommend or fix punishment in capital cases.[15] Of these California, Connecticut, New York and Pennsylvania have a two-trial system which permis a second jury to pass on sentence and a first jury to return only a verdict of guilt if the first jury is in disagreement as to punishment.[16] The drafters of the Model Penal Code also recommend that guilt and punishment of a defendant be determined in separate proceedings.[17]

As our disapproval of relevant California decisions indicates, we think that a two-trial system is not immune to constitutional attack, if under it are sustained challenges for cause of substantial numbers of prospective jurors in the guilt phase of the proceedings on the sole ground that they have objections to capital punishment without the further determination being made that these objections would

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[15] *Task Force Report: The Courts*, 26 op. ft. 4.

[16] Cal. Penal Code § 190.1; Conn. Gen. Stat. Ann. § 53-10; N.Y. Penal Code § 125.35; Penn. Stat. Ann. § 4701.

[17] Model Penal Code, § 201.6 (Prop. Final Draft 1962); See also, Tent. Draft No. 9 (1959).

interfere with their determination of the defendant's guilt or innocence. However, a two-trial system does provide a practicable means to accommodate the interests of the state in preventing hung juries in successive trials because the original jury cannot agree upon punishment and in preserving the possibility that the death penalty will be imposed. Under such a system, the defendant can be assured that only those persons whose adherence to their conscientious objections to capital punishment is so rigid as to preclude them from making an impartial determination of his guilt or innocence will be subject to a challenge for cause, while the state is simultaneously assured that, if a jury is called for the sole purpose of determining the defendant's punishment, it will be composed only of those persons whose consciences permit them to impose the whole gamut of punishments allowed by statute and that in no event will a guilty verdict unanimously agreed upon be lost by disagreement as to the appropriate punishment.

Under our view of how the existing North Carolina procedure and practice must be accommodated to a defendant's constitutional rights, prosecutors in that state must run the risk that a person who has conscientious objections to capital punishment will either successfully persuade his fellow-jurors that the death penalty should not be imposed on the defendant whose case is being tried or that he will cause the jury to disagree because of disagreement on the issue of punishment, although agreeing on the defendant's guilt. This is so because North Carolina's resolution of the conflict of the interest of the prosecutor in obtaining a jury which is free to sentence the defendant in any manner which the statute allows and petitioner's right to trial by a representative jury by making the state's interest wholly paramount cannot stand under the equal protection clause.

The district judge should issue the writ, staying its effect for a reasonable time, to permit the state to retry the petitioner.

Reversed and Remanded.

HAYNSWORTH, Chief Judge, concurring in result:

As Judge Bryan, I concur in the result, but I do so upon the very limited ground of the essential unfairness of excluding every juror who professed an unexamined scruple against capital punishment while seating every juror who professed a belief in capital punishment, including one who stated a belief that he was under a duty to vote for the death penalty in any case of murder. It is enough for me that the *voir dire* inquiry was far from even-handed and that many jurors, whom we would all agree were qualified, were excused for cause. I do not think this record presents any broader question or that it is appropriate for a declaration of new and sweeping constitutional principles.

On this point, the *voir dire* examination of each juror in this case opened with the question, "Do you believe in capital punishment?" If the answer was "No," he was asked a second question, typically, "You have conscientious scruples against it do you?" If the answer to the second question was "Yes," as it predictably was, without any further inquiry and no probing whatever, the court excused the juror for cause. The procedure was in strong contrast to the probing of the juror who reported that he had read of the case in the newspapers and had formed a fixed opinion. He was seated after agreeing that he could eliminate his fixed opinion from his mind and decide the case on the evidence.

It seems clear to me that among the thirty-four jurors

excused for cause on this ground there were many who had no more than a philosophical or intellectual antipathy to capital punishment. A large segment of the population today has such an antipathy, in varying degrees, including those who think a death sentence appropriate only in such extraordinary cases as murder committed under aggravated circumstances by a prisoner already under a sentence of life imprisonment for whom the threat of a second sentence of imprisonment would be no great deterrent.[1] There is certainly no showing here that such persons could not subordinate their personal beliefs and follow the court's instructions in considering the guilt or innocence of the defendant and, under North Carolina's practice, approach the question of punishment with a reasonable degree of open-mindedness.

Surely a state in a capital case is not entitled to a jury composed exclusively of the most bloodthirsty of her citizens, and differences in shades of opinion about the appropriateness of capital punishment in particular cases ought not to be allowed as the basis of distinctions affecting the qualification of jurors.

I strongly suspect, too, that among the thirty-four jurors, there were some, or perhaps many, who had not so much as an intellectual antipathy to capital punishment in some classes of capital cases. When it was repeatedly demonstrated to all members of the venire that one could be excused by giving two simple and pat answers to two simple questions, strong temptation was placed before those members who had important business to attend or golf games to play or who, for other reasons, were loath to serve.

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[1] There is nothing new in such antipathy. It has been responsible for the very substantial progress we have made in the last two centuries from a system in which the death penalty was imposed for most felonies.

There remains the possibility that there were some among the thirty-four jurors who were excused who had such deep-seated notions with religious, moral or philosophical foundations that they could not act impartially in considering the question of guilt or the question of punishment. It is only a possibility, however, for this record shows us nothing, and their number is surely relevant to the broad Fourteenth Amendment issues the court undertakes to decide.

Nor can I find any basis for speculation that some jurors holding unshakable convictions against capital punishment might nevertheless have a substantial capacity for impartial service on the question of guilt or innocence though not on the question of punishment. Usually, the two questions are inextricably intertwined. North Carolina's particular practice may be unusual, but it is not essentially different from the prevalent practice which attributes a binding effect to a jury's recommendation of mercy. Even in a jurisdiction in which the jury's function ends with a finding of guilt or innocence, a juror inflexibly opposed to capital punishment, knowing that the judge, or another jury, is likely to, or even may, impose the death penalty upon a verdict of guilty is very likely to equate a verdict of guilty with a sentence of death. Such a juror will hold out for a verdict of guilt of a lesser offense which does not permit a death sentence. Certainly the record furnishes no basis for a conclusion that there is any substantial number of people in North Carolina or anywhere else who would be capable of impartial service on the question of guilt in a capital case though admittedly incapable of such impartial service on the question of punishment.

Our speculation is a slender reed, indeed, to support the imposition upon the states, and United States District

Courts too,[2] of the extraordinary requirement of bifurcated trials in capital cases. Really what the majority requires is two full trials if the first results in a verdict of guilty, for the second jury can hardly decide the question of punishment without being fully informed of all of the circumstances of the crime, the defendant's defenses and his mental and notional condition, everything, in short, developed at the first trial.[3]

If the record disclosed the fact, one which seems to me most improbable, that a substantial number of the jurors excused held such firm convictions against the imposition of the death sentence as to be disqualified from service on the question of punishment and yet were capable of impartial service on the question of guilt or innocence, we would be met with the question the majority undertakes to resolve. When the record fails to reveal a single juror who could be so classified, I think we far exceed our judicial function in deciding a question which a different record conceivably might present. Deciding hypothetical issues is bad enough when the only consequences are felt in the immediate litigation; it is quite intolerable, to my mind, when it imposes far-reaching and extremely costly consequences in the general administration of criminal justice.[4] If the unlikely

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[2] Under 18 U.S.C.A. § 1111, the penalty for murder in the first degree within federal jurisdiction is death unless the jury qualifies its verdict with the words "without capital punishment," in which event the penalty is life imprisonment. A federal jury thus determines the punishment as does a North Carolina jury.

[3] They should have a great deal more, particularly the kind of information of which a judge may avail himself through a presentence report.

[4] Our judicial systems for the administration of criminal justice are suffering great stresses now as a result of assumptions of ever-increasing burdens. Ways must be found to shoulder those additional burdens which are necessary, but the needless imposition of very weighty and costly additional burdens cannot be afforded.

question ever is presented to a court, it will be time enough to face it then.

Because the state judge did not follow the even-handed approach approved in such cases as Pope v. United States, 8 Cir., 372 F.2d 710,[5] I concur in the result. I do not think any other question is presented on this record, and I think the court makes a grave mistake in undertaking to decide any other question.

I am authorized by Judge Bryan to say that he joins in this opinion.

SOBELOFF, Circuit Judge, concurring specially:

Following a somewhat different route, I concur in the result reached by the court and in most of its opinion. The extent of my disagreement is briefly indicated below.

I find it unnecessary to enter into the discussion between my brethren Winter and Craven as to whether the State has a sufficient interest in the preservation of the death sentence as a possible punishment to permit it to submit the *penalty* issue to a jury composed only of persons having no scruples against capital punishment. Without addressing this interesting but secondary question, I conclude that there has been a violation of the Fourteenth Amendment in this case simply because the issue of *guilt or innocence* was submitted to a jury under the trial court's rulings which systematically

[5] It appears in that case that ten jurors were excused after acknowledging such deep-seated scruples against capital Punishment as to prevent them from imposing it even though they conscientiously thought such punishment proper under the law and on the evidence. On the other hand, three other jurors were excused after indicating they thought the death penalty should be imposed upon one who committed a homicide in the course of a bank robbery regardless of the circumstances as disclosed by evidence.

excluded for cause every juror entertaining any scruples about capital punishment, and this without even inquiring whether these beliefs would preclude a fair consideration of the guilt issue. I agree that the conviction must be set aside because of the palpably unfair double standard of inquiry which excluded all with any degree of principle against the death penalty while seating one who admitted a bias against the defendant and another who felt that he would be under a mandate to impose the death penalty if the defendant should be convicted. This is the most obvious fault of the trial. But in addition, the procedure was constitutionally defective in the manner in which the list of prospective jurors was systematically combed with the result that the issue of innocence or guilt was tried before a "death qualified" jury.

However, I have conceptual difficulty with the theoretical footing chosen by the major opinion for invalidating the procedure which resulted in a "death qualified" jury for the determination of guilt as well as punishment. My concern is with the court's refusal to consider the due process argument while placing exclusive reliance on the equal protection clause. I agree unreservedly with Judge Craven that it is due process which forbids the practice employed here.

The underlying idea in all of the jury selection cases relied upon in the major opinion is that the fairness of the trial was impaired by the deliberate empaneling of a jury not truly representative of a cross-section of the community. To my mind, this is essentially a due process concept expressing the Constitution's interdiction of invidious discrimination in the method of jury selection. *See Smith* v. *State of Texas*, 311 U.S. 128, 130 (1940). The inherent objection to the exclusion of prospective jurors on account of race, sex, religion, philosophic belief or economic condition is

that it opens the way to a fact finder's partiality, bias and unfairness, which are often difficult to demonstrate in a particular case. These exclusions go to "the very integrity of the fact-finding process"[1] which depends on the presence of an impartial jury truly representative of a cross-section of the community. If this basic condition of representativeness is violated, due process is denied; and such an exclusion has been held reversible error without a showing of prejudice in the particular case. *See Labat* v. *Bennett*, 365 F.2d 698, 723 (5th Cir. 1966). If a venire list has been so manipulated as to become unrepresentative, it cannot be defended as measuring up to minimum constitutional standards of due process. After all, due process is simply the legal expression denoting fairness, and we are agreed that making the selection from an unrepresentative list is not fair.

It is difficult to escape the conclusion that the automatic disqualification of from 30% to 45% of the available jurors in capital cases destroys the representative character of the jury. That the submission of the question of guilt to the special group which remains after the siphoning process has a tendency to favor the prosecution has been affirmed by legal scholars and psychologists.[2] Even though the

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[1] Linkletter v. Walker, 381 U.S. 618, 639 (1965).

[2] The conclusion of these scholars is best summarized by Professor Walter E. Oberer in his article, "Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?", 39 Tex. L. Rev. 545, 549 (1961):

> "The consequence [of excluding jurors with scruples about capital punishment] is that a jury qualified on the death penalty will necessarily have been culled of the most humane of its prospective members. Human sympathy is hardly subject to nice compartmentalization. Jurors hesitant to levy the death penalty would also seem more prone to resolve the many doubts as to guilt or innocence in the defendant's favor than would jurors qualified on the 'pound of flesh' approach."

major opinion refuses to accept these studies, it recognizes that the excluded group, if allowed to serve, "may well have a 'subtle interplay of influence' upon the others." This is enough, for the due process claim stands upon the unrepresentative character of the list, and it is unnecessary to speculate as to the effect this particular group might have if permitted to participate. *Ballard* v. *United States,* 329 U.S. 187 (1946).

Nevertheless, the major opinion prefers to rely solely on the equal protection clause of the Fourteenth Amendment. It is true, as the opinion notes, that decisions pertaining to the systematic exclusion of jurors are usually couched in equal protection terms. This is because in each of the cases resting on this ground the practice complained of worked to discriminate directly against a particular class to which defendant belonged or with which he was affiliated. An example is the *Smith* case, *supra,* where a Negro defendant was tried before a jury from which members of his race were systematically excluded while the State tried white defendants without excluding from the jury members of their race. Thus individuals similarly situated were treated discriminatorily by the State, and the equal protection clause was appropriately invoked, without any negative implication as to the applicability of the due process clause. In *Eubanks* v. *Louisiana,* 356 U.S. 584, 585 (1961), the Supreme Court synthesized the equal protection jury exclu-

See also Adorno, "The Authoritarian Personality" (1950); Goldberg, "Attitude Toward Capital Punishment and Behavior as A Juror In Simulated Capital Cases" (1965) (unpublished study reproduced in petitioner's brief at App. 60 filed in the United States Supreme Court in Witherspoon v. State of Illinois, et al., ——— U.S. ——— (1968)); Wilson, "Belief in Capital Punishment and Jury Performance" (1964) (unpublished study reproduced in petitioner's brief at App. 66 filed in the United States Supreme Court in Witherspoon v. State of Illinois, et al., ——— U.S. ——— (1968)).

sion cases in these measured words: "In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is denied the equal protection of the laws guaranteed by the Fourteenth Amendment if he is indicted by a grand jury or tried by a petit jury from which members of *his* race have been excluded because of *their* race." (Emphasis added.)

In the instant case, the record fails to establish that the defendant, accused of murder, is a member of the class—persons with scruples against capital punishment—which the text of the major opinion clearly holds was accorded discriminatory treatment by the State. To say that the defendant has scruples against capital punishment as to himself fails to distinguish him from any of the jurors who actually tried him or from mankind in general. Because of their beliefs, otherwise qualified members of the excluded class, unlike individuals from other segments of society were denied the opportunity to adjudicate the guilt or innocence of defendants in capital cases. This is not to say, however, that the defendant has no standing to complain,[3] for denial of equal protection to the excluded class operates to deny him due process by forcing him to trial by a jury chosen from an unrepresentative cross-section of the community. It is only from this perspective that the case may be viewed as one involving a denial of equal protection. The denial of equal treatment to this identifiable group was an integral part of the judicial proceedings which culminated in defendant's conviction. By so demeaning the criminal process, one might contend, the State has violated the defendant's right to due process, "regardless of whom the unconstitu-

[3] *See* Ballard v. United States, 329 U.S. 187 (1946); Rabinowitz v. United States, 366 F. 2d 34, 37 & n. 1 (5th Cir. 1966); Allen v. State, 137 S.E. 2d 711, 714 (Ga. 1964); State v. Madison, 213 A. 2d 880 (Md. 1965).

tional state conduct may have affected in the first instance." *The Defendant's Challenge To A Racial Criterion In Jury Selection: A Study in Standing, Due Process and Equal Protection*, 74 Yale L.J. 919, 940, & n.106, pp. 939-40 (1965). In this limited sense, equal protection and due process may be said to coalesce in this case. But again, the ultimate ground for reversing the conviction would be due process.

If the class excluded be persons with scruples against capital punishment, equal protection alone cannot provide an adequate ground for decision. In every one of the decided cases which grants standing to a person not within the excluded class, the courts speak either not at all of equal protection, or of equal protection coupled with due process; none relies exclusively on equal protection. In *Allen* v. *State, supra,* a case involving a white civil rights worker tried before a jury from which Negroes were systematically excluded, the Georgia court unequivocally stated; "When a State law provides for indictment and trial by a jury, *due process of law,* in our opinion, includes indictment and trial by juries selected in accordance with the established law, from a list of citizens representing a cross-section of the community." (Emphasis added.)

In a footnote, in apparent departure from the theory of the text, the major opinion suggests that the class involved in this case is capital criminal defendants. The view seems to be that persons charged with capital offenses are treated inequitably compared to those accused of non-capital offenses who are tried before jurors unquestioned about their opinions of punishment. While this suggestion is decidedly unpersuasive, it in no way militates against the use of the due process clause in this case. Due process and equal protection are not mutually exclusive or conflicting to any

extent. I read due process as being the broader guarantee of fundamental fairness. For this reason, I cannot envision a mode of jury selection involving an infraction of equal protection that might possibly satisfy the demand of due process.

In addition to due process, there is yet another constitutional basis which supports the court's conclusion. In my view, not only were both due process and equal protection rights under the Fourteenth Amendment infringed, but no less emphatically the defendant's Sixth Amendment guarantee of trial by an impartial jury was violated. This guarantee applies to the states, *Parker* v. *Gladding*, 385 U.S. 363, 364 (1966). A jury is not an impartial one if it has been deliberately drawn from a restricted segment of the population that may reasonably be thought more "guilt oriented" than a random cross-section of the general community.

To this defendant, of course, it matters not at all which ground we rely upon in voiding his trial; the court, however, has a deeper and more enduring concern with relevant legal theory, and it should select the appropriate avenue to decision.

BOREMAN, Circuit Judge, joining with Chief Judge Haynsworth in concurring in result:

I, too, concur in the result reached by the majority insofar as the conviction is set aside and the opportunity is provided for the state to retry the petitioner. I readily join with Chief Judge Haynsworth in his separate statement of concurrence in the result which I adopt.

I would emphasize the thought that the court exceeds its judicial function in unnecessarily deciding a question

which is not presented by the present record and I echo Judge Haynsworth's observation that the decision of the majority "imposes far-reaching and extremely costly consequences in the general administration of criminal justice. If the unlikely question ever is presented to a court, it will be time enough to face it then."

ALBERT V. BRYAN, Circuit Judge, concurring in result, but dissenting from the reason, of the decision

I agree with reversal of the judgment on review, but I disagree with the majority's decisional premise: the successful challenge by the State of veniremen who were opposed to capital punishment. In my view no clause in the Constitution forecloses this judicial practice by North Carolina.

Staunch precedent for this conclusion is found in the cases cited but discarded by the majority. E.G.: Pope v. United States, 372 F2d 710 (8 Cir. 1967); Turberville v. United States, 303 F2d 411 (D.C. Cir. 1962), cert. den. 370 US 946; United States v. Puff, 211 F2d 171, 182 (2 Cir. 1954), cert. den. 347 US 963. A few quotations from them will, I think, demonstrate the soundness of their holdings.

Puff, supra, was decided in 1954 under the present Federal murder statute, 18 USC 1111. To sustain its view that the exclusion of veniremen for convictions opposing capital punishment, the Court, in *Puff*, quoted from Logan v. United States, 144 US 263, 298 (1892) as follows:

> "As the defendants were indicted and to be tried for a crime punishable with death, those jurors who stated on *voir dire* that they had 'conscientious scruples in

> regard to the infliction of the death penalty for crime were rightly permitted to be challenged by the government for cause. A juror who has conscientious scruples on any subject, which prevent him from standing indifferent between the government and the accused, and from trying the case according to the law and the evidence, is not an impartial juror. . . .And the principle has been applied to the very question now before us by Mr. Justice Story in United States v. Cornell [Fed. Cas. No. 14,868], 2 Mason, 91, 105, and by Mr. Justice Baldwin in United States v. Wilson [Fed. Cas. No. 16,730], Baldw., 78, 83, as well as by the courts of every state in which the question has arisen, and by express statute in many states."

Similarly, *Turberville*, supra, when passing upon the very question now before us reasoned in the tenor of *Puff*, and also said:

> "What [appellant] is really asserting is the right to have on the jury some who may be prejudiced in his favor—i.e., some who are opposed to one possible penalty with which he is faced. *We think he has no such constitutional right.* His right is to absolute impartiality." (Accent added.)

Pope, supra, fully approved the attitude of *Turberville* and *Puff*, with the following supplement:

> "The defense position comes down to a demand, not for an impartial jury which is neutral, but for something quite different, namely, a jury which includes persons who are prejudiced against—and, also, possibly for—capital punishment.

"We are also not persuaded by the argument that the trial court's exclusion of these persons served improperly to produce a panel which was something less than representative of the community. In a narrow sense this might be said but one could say the same thing in the same sense when a court very properly asks those persons to step aside who are personally acquainted with counsel for the prosecution, or who cannot read, or who cannot understand the English language. To that extent the panel is always a little less than representative of the community as a whole. But this exclusion does not produce an unfair jury or an illegally unrepresentative one or one which is not impartial in the Sixth Amendment sense. . . ."

As did these Courts, I feel that this principle governs whether or not the statutes exact capital punishment mandatorily or allow an optional verdict of life imprisonment.

Epitomized, my thinking is that in a trial under a statute like the one now considered, the question of the penalty is by present law injected into the question of guilt, and the act's validity is not doubted by the Court. A juror cannot vote "guilty" without qualification. Andres v. United States, 333 US 740. (1948). Therefore, if his conscience will not permit him to cast a ballot for the extreme penalty, he would be prevented from unqualifiedly declaring his equally conscientious conviction of the accused's guilt. He must stand aside as unacceptable because, although convinced of guilt beyond a reasonable doubt, he could not so say unconditionally. The statute plainly requires that, if the jurymen determine the defendant to be guilty of a capital offense, they must announce either the death penalty or life imprisonment. A juryman who has scruples about

taking the life of one he finds guilty of committing a capital offense has not a freedom of choice between capital punishment and life imprisonment.

No Constitutional invalidity is raised against the statute, and I perceive no fundamental bar to the State's rejection as a juryman of a veniremen conscience-bound against capital punishment. It is a perfectly understandable tenet and I imply no derision of the scruple. Nor do I intimate any view of the right or wrong of the death penalty. I say only that it is a question for determination by the State, not one for the Federal courts in passing upon State laws.

Reference is made by the majority to the percentage of persons in North Carolina averse to execution for crime. Granted the accuracy of these figures, I doubt the soundness of accepting the poll as representative of State or even community opinion. Rather I would look to the expressions of the North Carolina legislature in its enactments. The criminal statute here under study has remained the law of North Carolina for many years, and to me this is indicative of the public judgment of capital punishment. If the citizens of the State are unwilling to follow the statute, I have no doubt it would be promptly repealed or otherwise modified. Again, this action is not for the Federal courts.

However, I would reverse the conviction here for disallowance of the defense challenge to a veniremen who held it his *duty* to inflict capital punishment should the defendant be found guilty of murder. Cf. Stroud v. United States, 251 US 15, 20 (1919); United States v. Puff, supra, 211 F2d 171, 182. Moreover, there was trial error in the admission of inflammatory evidence and advertence before the jury to the defendant's prior criminal record. These incidents necessitate a new trial, and for that reason I concur in the determination of the court to reverse.

CRAVEN, Circuit Judge, concurring:

I readily concur in the decision of the court. I would go further and reject the court's premise that the state has a legitimate interest in obtaining the death penalty. There is no such state interest and there has not been since the 1949 statute left choice of punishment to the "unbridled" discretion of the jury. With that statutory change of direction the state relinquished its so-called legitimate interest in the death penalty in favor of obtaining *either* death or life imprisonment as equally appropriate punishments. Since either is appropriate, the state has no legitimate interest in the selection of a jury predisposed to either one.

That the jury choice is "unbridled" means only that the jury need not articulate or even consciously have a reason. Certainly it does not mean that jurors are not to reason together on the question of punishment as on all others. I cannot think of a better reason for a recommendation of life imprisonment than questioning the wisdom of capital punishment—whether on religious or other grounds. To rule out such a reason by systematic exclusion of the doubters results in an "unbridled" choice by a death-oriented jury. Any method of jury selection which systematically deprives the accused of cross-sectional community representation violates due process. "The end in view," as Chief Justice Stacy put it for the North Carolina Supreme Court, "is to get a fair cross-section of community judgment." *State* v. *Koritz,* 227 N.C. 552, 43 S.E.2d 77, 81 (1947).

It is obvious that there is no such cross-section in a system where 30 percent to 45 percent of otherwise qualified jurors are excluded because their viewpoint on a question within their unbridled discretion is not pleasing to the prosecution. To select a particular attitude of mind or heart—

whether for or against the death penalty—and upon it to erect an exclusionary rule for the selection of jurors in either the guilt or punishment phase of the trial is, in my opinion, fundamentally opposed to the concept of trial by jury and due process.

I would prefer to rest the decision upon denial of due process and infringement of the right to trial by jury rather than denial of equal protection, and I would hold that the defendant is entitled to a jury that has not been screened to avoid the exercise of a fair cross-section of community judgment and that this right applies to the determination of both guilt and punishment.